Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DALE A. BROWN, R. SCOTT SATTERWHITE, AND ANTHONY P. HODGSON,

Petitioners,

v.

THE UNITED STATES OF AMERICA, JAMES H. FRANCIS, JOSEPH E. CARROLL, JEAN BARRETT YETMAN, MICHELLE WYCKOFF, AND SHEILA CHADWICK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Brown, Hodgson and Satterwhite's *Bivens* claims against the federal agents in question were not primarily based upon typical *Bivens* allegations of false imprisonment, excessive violence, and wrongful search and seizure. Their causes of action were primarily based upon conduct by law enforcement officers which, if perpetrated by civilians, would amount to common law fraud and violation of RICO. The damages remedy available to them would be comparable to those available in a fraud case based upon principles of Texas common law. Under these circumstances, did the courts below err in applying Texas' two-year statute of limitations for personal injury actions, rather than Texas' four-year statute of limitations for fraud to Brown, Satterwhite and Hodgson's federal *Bivens* claims in this lawsuit?

II. The district court refused Brown, Satterwhite and Hodgson any right to conduct limited discovery solely on the fact issues which form the basis of the federal agents' qualified immunity defense prior to dismissal. Given this refusal, did the trial court and court of appeals err in holding that the agents involved in Operation Lightning Strike were immune from liability and suit based upon qualified immunity because Brown, Satterwhite and Hodgson's due process rights were not well-established at the time of the agents' wrongful conduct?

III. Did the district court err in dismissing, and the court of appeals err in affirming the dismissal of Brown, Satterwhite and Hodgson's causes of action under the Federal Tort Claim Act and based upon violation of their Fifth

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Amendment rights because their First Amended Complaint does not establish that they knew the identity of the individual agent defendants more than two (2) years prior to filing suit against them?

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The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, App. 1, and is reported at 188 F.3d 579. The Memorandum on Motions to Dismiss of the United States District Court for the Southern District of Texas, Galveston Division, is unreported, was entered on July 30, 1997, and is set forth in the Appendix at App. 25. The Final Judgment of the United States District Court for the Southern District of Texas, Galveston Division, is unreported, was entered on July 30, 1997, and is set forth in the Appendix at App. 35. A timely petition for rehearing was filed and denied on November 12, 1999, and is set forth in the Appendix at App. 37.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254(1). The United States Court of Appeals for the Fifth Circuit issued its denial of Brown, Satterwhite and Hodgson's timely-filed petition for rehearing on November 12, 1999. Accordingly, this petition for a writ of certiorari was due to be filed on or before February 10, 2000. By order dated February 15, 2000, Justice Antonin Scalia extended the time for filing this petition for a writ of certiorari until February 24, 2000. This Petition was timely filed on February 24, 2000, pursuant to the mailbox rule.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Fifth Amendment of the United States Constitution.

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The district court dismissed Brown, Satterwhite and Hodgson's First Amended Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Accordingly, this Court accepts the allegations stated in their complaint as true. *Sutton v. United Air Lines*, 527 U.S. 471, 119 S. Ct. 2139, 2143 (1999) (citing *United States v. Gaubert*, 499 U.S. 315, 327, 113 L.Ed. 2d 335, 111 S. Ct. 1267 (1991)).

A district court may not dismiss a complaint under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99 (1957).

The facts which follow appear in Plaintiffs' First Amended Complaint, which is contained in the Appendix to this Petition for Writ of Certiorari at App. 41.

In the early-1990s, Brown, Satterwhite and Hodgson owned two corporations – TerraSpace, Inc., and TerraSpace Technology, Inc. These were high-technology engineering and management companies that provided

products and services to the private and government sectors. TerraSpace, Inc. was awarded several engineering and management contracts with private companies. TerraSpace Technology, Inc. was awarded several engineering and software development contracts with Fortune 500 aerospace firms. It had also been awarded a multi-million dollar Space Shuttle software development contract. These contracts assured that both companies – and their principals – would enjoy financial success.

In May of 1992, a wealthy investor named John Clifford contacted Dale Brown. Clifford informed Brown that he was looking for persons or entities to develop a miniaturized medical device that would help astronauts survive in space. The device – a miniaturized lithotripter – is a high technology device used commercially to pulverize kidney stones. It can be further developed into a multi-tissue ultrasonic imaging system.

Clifford proposed that a Houston aerospace firm form a partnership with a company called Eastern Tech Manufacturing Corporation ("ETMC"), to gain multi-million dollar contracts with NASA and its contractors. Clifford promised venture capital to start commercial and government projects and promised over a million dollars for business, engineering, and technical services.

On or about July 9, 1992, Clifford offered Brown the position of Chief Financial Officer and Vice President of Marketing for Space, Inc., Clifford's company. Clifford offered Brown a monthly salary of $5,000 plus expenses, with payments to be made through one of Clifford's other companies, Southern Technologies Diversified, L.P. (hereinafter "STD"). Essentially, Clifford hired Brown away

from TerraSpace, Inc., TerraSpace Technology, Inc., and his co-owners, Satterwhite and Hodgson.

Clifford promised Brown millions of dollars in venture capital to support TerraSpace, Inc., and TerraSpace Technology, Inc. Based upon Clifford's representations, Brown, Satterwhite and Hodgson believed that it was in their best interest for Brown to establish a long-term business relationship with Clifford.

From August 1, 1992 to approximately March 10, 1993, Brown made hundreds of presentations as Chief Financial Officer and Vice President of Marketing for Space, Inc., under Clifford's direction. Clifford directed Brown to merge the financial summaries of the businesses owned by Clifford with Space, Inc., to reflect the combined resources of Clifford's growing conglomerate. Clifford provided Brown with detailed financial information and other significant accounting data necessary to perform this task.

In March of 1992, ETMC represented itself to Brown to be the manufacturing company that would provide the technology and the facilities for the manufacture of the miniaturized lithotripter.

In April of 1992, Jody Jones, a vice-president of NationsBank, provided Brown's business associate, Neal Jackson, with information that Clifford and his business partner, Joe Carson, doing business as STD, had a one million dollar line of credit with NationsBank to support the miniaturized lithotripter project. She further informed Jackson that Clifford and Carson had accounts

with NationsBank totaling one hundred thirty (130) million dollars. Jones repeated this information to Brown in April and May of 1992.

In May of 1992, NationsBank, Dun & Bradstreet (hereinafter "D&B") and Conn & Company provided Brown, Satterwhite and Hodgson with favorable financial information about Clifford's other companies: STD, ETMC, Clifford himself, and Clifford's business partner, Joe Carson. These companies continued to provide such information for a period of approximately two years.

In July of 1992, Brown attempted to verify financial information provided to him by Clifford about himself and his companies. Conn & Company, D&B, and NationsBank all verified Clifford's information about the companies' assets, liabilities, gross sales, net worth and officers and directors.

Also in July of 1992, Conn & Company confirmed for Brown the veracity of an accounting report for calendar year 1991. This report was to be used by Brown to develop a financial plan for Space, Inc. Additionally, Conn & Company confirmed that Clifford and Carson were principals in STD.

In October of 1992, Larry Seiler, a vice-president of ETMC, flew Brown to Columbia, Maryland, for a tour of ETMC's facilities. Seiler portrayed ETMC as a facility that was involved in the manufacture of lithotripters. While on that trip, Seiler and Clifford showed a device to Brown which was supposed to be a prototype of a miniaturized lithotripter.

Brown relied upon the information provided on the ETMC trip when negotiating contracts and sales with companies and agencies within the aerospace community. As a result of, and in good faith reliance on this information, Brown conveyed the information to Satterwhite and Hodgson. Satterwhite and Hodgson, in turn, relied upon the information in question when making business decisions and service and sales proposals to companies and agencies within the aerospace community and the commercial marketplace.

Throughout the end of 1992 and well into 1993, Brown, Satterwhite and Hodgson continued to work with Clifford, Carson, STD, and the several other entities owned and controlled by Clifford and Carson. Throughout this period of time, Clifford drained Brown, Satterwhite and Hodgson's personal and business resources for the purposes of making them more susceptible and amenable to Clifford's business proposals.

Clifford convinced Brown, Satterwhite and Hodgson that they could count on millions of dollars in future business if they could introduce him to high level people in the aerospace community. Brown, Satterwhite and Hodgson agreed to cooperate. Over the course of 1992 and 1993, they introduced Clifford to top-level managers of NASA and local aerospace companies including Rockwell, Lockheed, IBM, Loral, Boeing, General Electric, McDonnell Douglas, Martin Marietta, and others.

Through the efforts of Brown, Satterwhite and Hodgson, Space, Inc., legitimately won several bids, but never received any compensation because the FBI agents

took steps to ensure that the contracts would go to other bidders.

From December of 1992 to March of 1993, Clifford and Carson perpetrated a system of psychological persuasion and coercion against Brown. Clifford methodically sought information about Brown's greatest dreams, desires, fears, and wishes, then psychologically persuaded Brown to abandon his lifelong career plans in the commercial space industry for another wholly unrelated job. Clifford and Carson offered Brown the opportunity to become construction supervisor, overseeing the construction of a multi-million dollar hotel and dive resort in the Bahamas called Isla del Oro. They promised Brown a very large salary as well as excellent fringe benefits including a personal plane. These promises were made in an effort to compel Brown to dissolve his partnerships and relationships with Satterwhite and Hodgson. Clifford told Brown that he would be working as an environmentalist, responsible for moving, restoring and preserving the natural coral reefs that surrounded the island.

On or about March 3, 1993, Clifford informed Neal Jackson that a representative of the Tobyhanna Army Base would be in Houston. Clifford instructed Jackson to entertain the representative with Brown's assistance. On or about March 4, 1993, Clifford told Brown to make himself available to help Jackson. In this conversation, Clifford told Brown that he should be ready to leave for the Isla del Oro by the end of the week.

Later that day, Clifford informed Jackson that the representative did not want to be entertained, but

requested that someone go to his hotel room with entertainment funds. Brown and Jackson drove to the Hobby Airport Hilton, where Jackson handed Brown a sealed envelope and instructed Brown to deliver the envelope to Room 509. Brown did as he was told.

Six months later, on or about August 4, 1993, Brown was directed to a clandestine warehouse in Houston, Texas. In that warehouse, his life was forever changed. Numerous law enforcement officials whose identities were unknown to Brown were present at the warehouse. For the first time, Brown found out that a governmental entity, with the aid of private individuals and corporations, had perpetrated a world-class fraud upon him. Unbeknownst to Brown, wealthy investor "John Clifford" was, in reality, an FBI agent. His "partner" "Joe Carson" was another FBI agent. There was no miniaturized lithotripter program. Brown would never reach the Isla del Oro.

Brown found out that he had been an unknowing participant in an undercover operation code-named "Operation Lightning Strike." Operation Lightning Strike began in the fall of 1991. The purpose of the undercover investigation was to discover any illegal activity being committed by NASA employees or its aerospace industry contractors in the contract procurement process.

Though their First Amended Complaint does not establish any knowledge on the part of Brown, Satterwhite or Hodgson of this fact at the time of the occurrences in question, Operation Lightning Strike was headed up by the Federal Bureau of Investigation ("FBI"), the Office of the Inspector General ("OIG"), and the

Defense Contractor Investigative Service ("DCIS"). These agencies and their agents procured the cooperation of many private entities such as NationsBank, ETMC, D&B, Conn & Company, and Hilton Hotels Corporation in order to make the sting look more realistic.

Some of the private entities were given false information about persons and entities involved in the sting by FBI agents. The private entities, such as Dun & Bradstreet, would, in turn, pass this false information on to Dale Brown and others similarly situated with actual knowledge that the information was false. Others of them permitted the FBI to videotape and audiotape hotel rooms in a clandestine fashion in an effort to entrap Dale Brown and others similarly situated.

Federal law enforcement agents used illegal intimidation and psychological abuse to coerce and blackmail Brown into going undercover and setting up other stings on other aerospace contractors. Armed agents of the OIG and the FBI subjected Brown to many hours of intense interrogation. Brown was subjected to intimidation, disorientation, and coercive persuasion, as well as brain washing techniques. He was confined in the interrogation warehouse against his will.

During the interrogation process, Brown was held against his will and interrogated without having been advised of his *Miranda* rights. In fact, Brown was told by his captors that he could not contact an attorney or he would be arrested, held in jail for up to thirty days – in isolation – with no telephone calls.

Brown was later subjected to illegal detention and interrogation by the FBI agents in Houston. Continually

proclaiming his innocence, Brown was subjected to both psychological as well as physical abuse by FBI and DCIS agents. Agents Francis and Booth physically assaulted Brown during this secret interrogation.

Beginning in August of 1993 and continuing for the next three months, the agents forced Brown, through a blackmail scheme, to become an unpaid informant whose goal was to infiltrate the local aerospace community. The agents threatened Brown with prosecution of twenty-one crimes, sixty years in prison, and fines totaling more than $1.2 million if he did not cooperate. As part of the scheme, the agents forced Brown to settle a multi-million dollar civil lawsuit that he had filed against a company that was a target of the sting operation.

On or about May 22, 1994, a public statement was made by Francis stating that after two years of intensive investigation, the FBI was directed by national-level government officials to abandon their sting operation. Francis claimed that the investigation was politically derailed so that the Department of Justice "would not be compelled to prosecute the big fish." To justify what had become a multi-million dollar investigation, the FBI agents sought indictments against many of the individuals they had coerced into being informants, including Brown.

The consequences of Brown, Satterwhite and Hodgson's interactions with "Clifford" and "Carson" were severe and dramatic. In an effort to catch other people violating contract procurement laws, the federal law enforcement agents caused the three men to exhaust their personal and business capital. The agents caused

Brown, Satterwhite and Hodgson to chase phony multi-million dollar business contracts over a several month period of time as well as destroying their reputations in the aerospace community.

On or about August 12, 1994, Brown suffered massive heart failure. Emergency heart surgery was performed on August 18, 1994, with the doctors giving Brown slim chances for survival from the bacterial stress-related infection that severely damaged his heart.

On August 24, 1994, a grand jury returned an indictment for one count of offering a $500 bribe to a public official against Brown. On or about July 1, 1995, the first criminal trial terminated in favor of Brown, in that it ended in a mistrial. Brown was to be retried. On or about September 1, 1995, the second criminal trial was terminated in favor of Brown in that the U.S. Attorney's Office declined to retry the case and subsequently dismissed the charge against Brown.

As a result of damage to their reputations, huge financial losses, physical and psychological abuse, and in the case of Brown, very severe and life-threatening stress-induced illness, Brown, Satterwhite and Hodgson found their lives devastated.

Brown, Satterwhite and Hodgson filed this lawsuit in order to recover damages suffered at the hands of the governmental and non-governmental individuals and entities who perpetrated this callous, evil-spirited, financially ruinous hoax upon them. They asserted causes of action based upon the Racketeering Influenced and Corrupt Organizations Act ("RICO"), the Federal Tort Claim Act ("FTCA"), civil conspiracy, intentional infliction of

emotional distress, fraud and deceit, invasion of privacy, interference with economic advantage and benefit, abuse of process, malicious prosecution, assault, as well as federal constitutional claims against FBI agents, Francis, Carroll, Yetman, Wyckoff, and Chadwick, DCIS agent Booth and OIG agent Carrington. These included denial of due process, and violations of the Fifth Amendment.

The district court dismissed all of Brown, Satterwhite and Hodgson's claims in an opinion and judgment that were entered on July 30, 1997. The Fifth Circuit Court of Appeals affirmed the district court's dismissal of all claims in an opinion and judgment issued on September 8, 1999. Curiously, the court of appeals affirmed the district court's judgment on almost entirely different grounds than were set forth by the district court.

REASONS FOR GRANTING THE WRIT

This Court has never addressed the manner in which courts should determine what statute of limitations is applicable to a claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971). Numerous courts of appeals have mechanically applied this Court's "comparable state law claim" test as set forth by this Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985), with respect to 42 U.S.C. section 1983 claims. Unfortunately, this has resulted in a broad-brush application of the forum state's personal injury statute of limitations, even where the cause of action in question should be classified as something other than "personal injury." Where, as here, the

conduct in question and the damages resulting therefrom sound in fraud, the forum state's four-year fraud statute of limitations should have been applied rather than the two-year personal injury statute of limitations.

ARGUMENT

I. Brown, Hodgson and Satterwhite's *Bivens* claims against the federal agents in question were not primarily based on typical *Bivens* allegations of false imprisonment, excessive violence, and wrongful search and seizure. Their causes of action were based upon conduct by law enforcement officers which, if perpetrated by civilians, would amount to common law fraud and violation of RICO. The damages remedy available to them would be comparable to those available in a fraud case based upon principles of Texas common law. Under these circumstances, did the court of appeals and the district court err in applying Texas' two-year statute of limitations for personal injury actions, rather than Texas' four-year statute of limitations for fraud to Brown, Satterwhite and Hodgson's claims in this lawsuit?

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971) (hereinafter "*Bivens*"), this Court recognized a common law cause of action on behalf of citizens whose federally-protected constitutional rights were violated by federal agents. This Court did not state in *Bivens* – and has not addressed in the three decades since that opinion was issued – what statute of limitations is to be applied to a *Bivens* claim.

Most courts of appeals that have addressed this issue analogize a *Bivens* claim to a claim for damages pursuant to 42 U.S.C. section 1983. *See, e.g., Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987); *Pena v. United States*, 157 F.3d 984, 987 (5th Cir. 1982) (per curiam); *Kurinsky v. United States*, 33 F.3d 594, 599 (6th Cir. 1994), *cert. denied*, 514 U.S. 1082 (1995); *King v. One Unknown Federal Correctional Officer*, 2000 U.S. App. Lexis 207 (7th Cir. 2000); *Sanchez v. United States*, 49 F.3d 1329, 1329-30 (8th Cir. 1995); *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991); *Industrial Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 968-69 (10th Cir. 1994); *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996).

As a result, courts of appeals generally apply the statute of limitations applicable to personal injury actions in the forum state to *Bivens* causes of action in compliance with this Court's ruling in *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938 (1985).

The problem is that in general, most causes of action pursuant to 42 U.S.C. section 1983, and indeed, most causes of action pursuant to *Bivens* are, generally speaking, in the nature of personal injury actions. Most often seen are claims of wrongful search and seizure, wrongful arrest, false imprisonment, malicious prosecution, and the like.

This case is different. For a number of years, several federal agencies and their constituent agents worked together to surreptitiously set up and execute a sting operation designed to ferret out illegal bribes amongst NASA contractors. The federal agencies involved went to great lengths to convince Brown, Satterwhite and

Hodgson, among others, that they were businessmen seeking to conduct lucrative business with them.

If employees of Xerox or IBM had done what the federal agents did to Brown, Satterwhite and Hodgson, there is little doubt that each such employee would be facing liability for fraud pursuant to applicable federal and state statutes and common law. In fact, the fraudulent nature of the entire enterprise is showcased in the following excerpt from the FBI agents' brief to the court of appeals in this case: "Fairly read, the complaint in this case makes clear that essential to the FBI's undercover operation was the illusion that the fictitious John Clifford and his companies had the financial wherewithal to act as "players" in the aerospace industry. That illusion was dependent upon the cooperation of credible private entities, such as NationsBank, Dun & Bradstreet, Conn & Company and ETMC." United States' Brief of Appellee at 40.

Thus, where the typical 1983 or *Bivens*-claim results from personal injury type conduct which results in personal injuries to the complainants, the federal agents' conduct in this case was more in the nature of common law fraud, with resulting fraud damages to Brown, Satterwhite and Hodgson.

This being the case, the district court and the court of appeals should have applied Texas' four-year statute of limitations for fraud (pursuant to Texas Civil Practice & Remedies Code Annotated section 16.004), to the *Bivens* claims herein, rather than the two-year statute of limitations for personal injury (pursuant to Texas Civil Practice & Remedies Code Annotated section 16.003).

While this case is different than the typical *Bivens* or 1983 claim, the circumstances which bring this case before this Court are hardly unique. From Operation Greylord to Abscam to Operation Lightning Strike, the FBI and other federal law enforcement agencies have made sting operations a prime weapon in their law enforcement arsenal. One need only perform a computerized legal research query pertaining to "sting operation" to receive literally thousands of "hits," resulting from the thousands of sting operations that are utilized by law enforcement agencies every year.

II. The district court refused Brown, Satterwhite and Hodgson any right to conduct limited discovery solely on the fact issues which form the basis of the federal agents' qualified immunity defense prior to dismissal. Given this refusal, did the trial court and court of appeals err in holding that the agents involved in Operation Lightning Strike were immune from liability and suit based upon qualified immunity because Brown, Satterwhite and Hodgson's due process rights were not well-established at the time of the agents' wrongful conduct?

The court of appeals correctly held that the conduct of the FBI agents in question violated Hodgson's constitutionally protected rights under the facts and circumstances involved in this case. When the Court properly applies the limitations analysis set forth in section I of this petition, the Court should, we respectfully submit, extend this holding to include Brown and Satterwhite as persons whose constitutionally protected rights were violated.

That alone, of course, would not necessitate reversal of the district court's dismissal of Brown, Satterwhite and Hodgson's lawsuit under the state of the court of appeals' September 8, 1999 opinion and judgment. Why? The court of appeals found that the constitutional rights claimed by Hodgson and violated by the FBI agents were not "clearly established" during 1992-94. Unfortunately, at the time this case was briefed, and even at the time this case was argued in the court of appeals, neither Petitioners nor respondents had available to them very recent case authority from this Court on the issue of how to determine when constitutional rights are clearly established for purposes of a qualified immunity analysis.

In *Wilson v. Layne*, 119 S. Ct. 1692 (May 24, 1999), this Court provided guidance to lower courts as to the factors to be considered in determining whether a constitutional right is clearly established for purposes of a qualified immunity analysis.

The issue before this Court In *Wilson* was whether a citizen who has an arrest warrant served upon him in his home has a constitutionally protected right pursuant to the Fourth Amendment to be free from media intrusion in his home while the warrant is being served. The Court concluded that such a constitutionally protected right does exist, but that holding is not important to this case. What is important is that the Court engaged in a methodical and thoughtful analysis of how to determine whether a constitutional right is "clearly established" for purposes of a qualified immunity analysis.

The first factor that the Court looked to in its qualified immunity analysis was whether the constitutional

question presented was "open and shut." *Wilson*, 119 S. Ct. at 1700. That factor is analogous to the court of appeals' determination that this case represents "the first time the parameters of due process protections afforded innocent third parties injured by law enforcement stings run amok."

Brown, Satterwhite and Hodgson do not dispute the court of appeals' finding that this is the first case to address the constitutional rights of innocent third parties arising out of law enforcement sting operations run amok.

The problem, however, is that the court of appeals determined this lone factor to be dispositive of whether Hodgson's constitutional rights were "clearly established" during the 1992-94 time frame. By comparison, this Court considered this as a factor in favor of a finding of qualified immunity, but also considered other factors as well.

First, the Court also considered whether the wrongful conduct at issue was commonplace or whether it represented an isolated incident. *Wilson*, 119 S. Ct. at 1700. In this case, Brown, Satterwhite and Hodgson have no information to establish whether the FBI's conduct in this case was commonplace or an isolated incident.

Second, the Court considered whether the governmental agency which employed the agents in question maintained a written or unwritten policy specifically authorizing the conduct in question. *Wilson*, 119 S. Ct. at 1700-01. In this case, Brown, Satterwhite and Hodgson have no information whether the FBI maintained written

or unwritten policies or manuals that specifically authorized or prohibited the type of conduct engaged in by the FBI agents in question.

Finally, the Court considered the specific information that each federal agent possessed as to whether they knew that the conduct they were engaging in was appropriate or inappropriate. *Wilson*, 119 S. Ct. at 1700. In this case, Brown, Satterwhite and Hodgson have no information as to what each FBI agent involved in the tortious conduct in question knew or did not know as to the inappropriateness of their conduct.

Does lack of information on the part of Brown, Satterwhite and Hodgson as to these three factors mean that this court of appeals' finding of qualified immunity is appropriate?

No. One of the forms of appellate relief sought by Brown, Satterwhite and Hodgson in this case was the right to conduct limited discovery on the factual matters that bear on the issue of qualified immunity. The district court dismissed this lawsuit pursuant to Federal Rule of Civil Procedure 12(b) after prohibiting Brown, Satterwhite or Hodgson from conducting any discovery whatsoever – even limited discovery – on the factors that bear on the qualified immunity analysis. This Court recently acknowledged and approved of a litigant's right to limited discovery on factual issues bearing on the question of qualified immunity in *Crawford-El v. Britton*, 523 U.S. 574, 593, n.14; 118 S. Ct. 1584, 1594 (1998), in relevant part, as follows:

> *Harlow* sought to protect officials from the costs of "broad-reaching" discovery, 457 U.S. at 818,

> and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 646, n. 6, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985).

The district court's dismissal of the agents on *Bivens* grounds and for violation of the Racketeering Influenced Corrupt Organizations Act was improper for failure to give Brown, Satterwhite and Hodgson even limited discovery to determine whether or not the agents in question were entitled to the benefit of qualified immunity under the facts and circumstances presented.

Based upon *Crawford-El*, Brown, Satterwhite and Hodgson neither ask nor expect this Court to remand this case to the district court with a finding that the FBI agents in question were not entitled to qualified immunity under the facts and circumstances presented. Brown, Satterwhite and Hodgson simply ask this Court to vacate the district court's dismissal of this case, remand it to the district court, and instruct the district court to permit them limited discovery on the factual elements of the qualified immunity multi-factor test set forth by this Court in *Wilson v. Layne, infra*.

III. Did the district court err in dismissing, and the court of appeals err in affirming the dismissal of Brown, Satterwhite and Hodgson's causes of action under the Federal Tort Claim Act and based upon violation of their Fifth Amendment rights because a liberal reading of the First Amended Complaint indicates that they did not know the identity of the individual agents more than two (2) years prior to filing suit against them?

The district court dismissed Brown, Satterwhite and Hodgson's causes of action under the Federal Tort Claim Act and based upon violation of their Fifth Amendment rights on the ground that they were barred by the applicable two-year statute of limitations.

The law pertaining to application of limitations to the running of limitations on federal causes of action has been summarized, in relevant part, as follows:

> Under federal law, the [limitations] period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Russell v. Board of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992) (quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987)), cert. denied, ___ U.S. ___, 113 S. Ct. 1266, 122 L. Ed. 2d 662 (1993). n10. A plaintiff's awareness encompasses two elements: (1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions. *See Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.) ("The statute of limitations period commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) ***the identity of the person who***

inflicted the injury."), cert. denied, ___ U.S. ___, 113 S. Ct. 69, 121 L. Ed. 2d 35 (1992).

See also Stewart, 951 F.2d at 684 ("The prescriptive period will not commence prior to the time the plaintiff is or should be aware of the causal connection between his injury and the acts of the defendant."); *Longoria*, 779 F.2d at 1138 ("The limitations period thus begins to run when the plaintiff either is or should be aware of both the injury and its connection with the alleged acts of the defendant."); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (5th Cir. 1980) (beginning limitations period "when the plaintiff is, or should be, aware of both the injury and its connection with the acts of defendant").

When a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled. *See United States v. Kubrick*, 444 U.S. 111, 122, 100 S. Ct. 352, 359, 62 L. Ed. 2d 259 (1979) (tolling limitations period where "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain."); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1521-22 (5th Cir. 1993) (affirming summary judgment on limitations grounds, stating that: "No facts indicate to us that the alleged discrimination was either hidden or for some reason not apparent to a reasonable prudent person," and contrasting to scenario in which defendant's actions would not lead a reasonably prudent person to suspect critical facts and investigate further).

Piotrowski v. City of Houston, 51 F.3d 512, 516-17 (5th Cir. 1995) (emphasis added).

When this Court reviews Plaintiffs' First Amended Complaint, it is unmistakable that Brown, Satterwhite and Hodgson suffered some injury more than two years prior to presenting their claim in writing as to the causes of action asserted in this case. However, that is only one part of the limitations inquiry.

Plaintiffs' First Amended Complaint contains absolutely no statement whatsoever indicating when Brown, Satterwhite and Hodgson acquired possession of the critical fact of who caused their injury. In other words, while Brown, Satterwhite and Hodgson believed more than two years prior to presenting their claim in writing that they were being interrogated, falsely imprisoned and otherwise harmed by law enforcement officials, Plaintiffs' First Amended Complaint does not state, or even imply, that Brown, Satterwhite and Hodgson knew or believed they knew the identity of the specific agents involved in this matter more than two years before they presented their claim in writing. In fact, Brown, Satterwhite and Hodgson pleaded affirmatively that "[t]he operation remained covert for approximately three years, until a press conference held on February 24, 1994."

These omissions from the first amended complaint are dispositive of the district court's erroneous decision to dismiss the FTCA causes of action on the basis of limitations. This is so because on review of a Rule 12(b) motion to dismiss, the complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Campbell v. Wells Fargo*

Bank, 781 F.2d 440, 442 (5th Cir. 1986). The district court may not dismiss a complaint under rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). *See also Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997).

CONCLUSION

Effective law enforcement under the Constitution of the United States of America is a constant balancing act between the rights of innocent citizens to be free from undue government intrusion, on one hand, and the right of government to aggressively prosecute criminal activity, on the other. Sting operations are rapidly becoming a weapon of choice in law enforcement agencies' "war against crime."

Should law enforcement agencies be permitted to utilize sting operations to ferret out and prosecute criminal activity? After everything that they have been through, Brown, Satterwhite and Hodgson still answer this question with a resounding, "yes." One additional question need be answered in order that constitutional symmetry be returned to the equation, however.

Should innocent victims of government sting operations who are not targets of the sting operation be permitted compensation for their damages resulting from such an operation. The answer to this very important question also should be a resounding, "yes."

Dale A. Brown, R. Scott Satterwhite and Anthony P. Hodgson, respectfully pray that this Court grant *certiorari* to review the important substantive and procedural issues raised in this petition, and in doing so, reverse the Fifth Circuit and order this case back to district court so that Petitioners may perform limited discovery bearing on the qualified immunity issues raised herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41214

DALE A. BROWN; ET AL

Plaintiffs,

DALE A. BROWN; R. SCOTT SATTERWHITE;
ANTHONY P. HODGSON

Plaintiffs-Appellants,

VERSUS

NATIONSBANK CORPORATION; ET AL

Defendants,

NATIONSBANK CORPORATION; JODIE JONES;
CONN & COMPANY; SOUTHERN TECHNOLOGIES
DIVERSIFIED, L.P.; HAL FRANCIS, also known as
John Clifford; JOSEPH CARROLL, also known as
Joe Carson; HILTON HOTELS; LEISURE
HOSPITALITY MANAGEMENT COMPANY doing
business as Sheraton Hotel-Astrodome;
UNITED STATES OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Sep. 08, 1999)

Before DAVIS, STEWART, and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Dale A. Brown, R. Scott Satterwhite, and Anthony P. Hodgson brought claims against the United States, federal agents, and private businesses who assisted federal agents in an undercover operation designed to detect contract procurement fraud in the space industry. The district court dismissed all claims against the government, federal agents, and private defendants. Brown, Satterwhite, and Hodgson appeal. We AFFIRM.

I. FACTS

Dale A. Brown, R. Scott Satterwhite, and Anthony P. Hodgson ("Appellants") owned and operated two respected and successful Houston-based corporations called TerraSpace, Inc. and TerraSpace Technology, Inc. The companies provided high-tech engineering and management services to the private and government sectors. TerraSpace, Inc. received several engineering and management contracts for services to the private sector. TerraSpace Technology was successful in securing engineering and software development contracts with aerospace firms and were awarded a multi-million dollar Space Shuttle software development contract.

In the Fall of 1991, the Federal Bureau of Investigation began a sting operation, called Operation Lightning Strike, designed to uncover contract procurement fraud and other illegal activity committed in the aerospace community. The undercover operation targeted employees of the National Aeronautic and Space Administration and aerospace contractors doing business with NASA. Both the NASA Office of the Inspector General

("OIG") and the Defense Contractor Investigative Service ("DCIS") participated in the sting.

In May, 1992, FBI Special Agent James H. Francis, posing as a wealthy investor named John Clifford, initiated contact with Appellants Brown, Satterwhite, and Hodgson. Clifford told Appellants that he owned a Maryland-based company called Eastern Tech Manufacturing Company ("ETMC") and that he wanted to find a Houston-based aerospace firm to form a partnership with ETMC in order to gain contracts with NASA and its contractors. Appellants were not targets of the sting operation, but were selected by the FBI as entities that could be used in order to gain access to the aerospace community. Appellants were unaware that they and their companies were being set up by the FBI as tools of deception in an undercover operation.

Clifford represented to Appellants that he wanted to develop a miniature medical device, a "lithotripter," that astronauts could use to pulverize kidney stones while in space. Clifford suggested that his company, ETMC, would provide technology and facilities for the development of the lithotripter. Further, Clifford contended that the device would be developed into a multi-tissue ultrasonic imaging system.

In July 1992, as the plans for the lithotripter developed, Clifford offered Brown a job as the Chief Financial Officer and Vice-President of Marketing of another company ostensibly owned by Clifford, called Space, Inc. As the Vice-President, Brown was offered a monthly salary of $5,000.00 plus expenses. Brown was to receive his salary through yet another one of Clifford's illusionary

companies, Southern Technologies Diversified, L.P. ("STD"). Clifford directed Brown to perform a number of activities for Space, Inc. From August of 1992 to March of 1993, Brown made numerous presentations as the Chief Financial Officer and Vice-President of Marketing of Space and he spent time merging financial summaries of Clifford's businesses with Space. To further gain Appellants' confidence and trust, Clifford promised to lend them millions in venture capital for their companies.

As the Operation developed, the FBI enlisted the assistance of several private companies to legitimize and lend credibility to its fictitious business enterprises. During the summer of 1992, Nationsbank provided financial information via telephone to Brown's business associate, Neil Jackson, about Clifford and Clifford's business partner, Joe Carson (FBI agent Joseph Carroll). Nationsbank informed Jackson that Clifford and Carson had accounts with Nationsbank totaling one hundred thirty (130) million dollars and a one million dollar line of credit. In June and July, 1992, Dun & Bradstreet provided favorable information via telephone and fax about the FBI's front company, STD. In July, 1992, Conn & Company also provided favorable financial information via telephone regarding STD.

By October, 1992, the Operation had developed its facilities for the production of the lithotripters. Larry Seiler, a Vice-President of ETMC, flew Brown to Columbia, Maryland to view ETMC's facilities and to learn about the manufacture of lithotripters. At this time, ETMC persuaded Brown that it had the capability to develop a product called the Printed Wiring Assembly

Robotic Tinning System ("PWARTS"), for which it represented it intended to negotiate a future contract with the Tobyhanna U.S. Army base. In the following months, ETMC represented, via fax and telephone, various plans to develop other devices such as a digital pager, infrared sensors, and mine detectors.

In 1992 and 1993, Appellants worked hundreds of hours and spent large amounts of money bidding on projects. Appellants also introduced Clifford to managers at NASA and aerospace companies, including Rockwell, Lockheed, IBM, Loral, Boeing, General Electric, McDonnell Douglas, Martin Marietta, and others. Ultimately, Space submitted several successful bids on contracts.

In December, 1992, Clifford and Carson offered Brown an opportunity to develop a multi-million dollar hotel and dive resort in the Bahamas, called "The Isle of Gold." Persuading Brown to leave his job in the aerospace industry, Clifford and Carson promised him a large salary, excellent fringe benefits, and a personal plane. Because of this opportunity, Brown dissolved his business relationship with Satterwhite and Hodgson and made extensive arrangements to leave the country and sell his home.

On February, 26, 1993, Clifford told Jackson, Brown's associate, that a procurement officer from the U.S. Army's Tobyhanna base would be arriving in Houston. Clifford directed Jackson to "entertain" the procurement officer and told Jackson to enlist Brown's assistance. On March 4, 1993, Brown and Jackson went to the Hilton Hotel at Hobby Airport in Houston. In the parking lot, Jackson provided Brown with a sealed envelope containing

"entertainment funds," and told Brown to deliver the envelope to the procurement officer's hotel room. As Brown delivered the envelope to a man in the hotel, the FBI recorded the transaction, using audio and visual recording equipment in the room.

Six months later, on August 4, 1993, Brown learned that there was no miniature lithotripter device and that Clifford and Carson were government undercover agents. Attempting to convince Brown to work as an unpaid undercover informant to set up stings, the FBI agents physically and psychologically intimidated Brown. On numerous occasions throughout August and September, 1993, the agents questioned Brown for multiple hours without the presence of an attorney and detained him against his will. Brown was threatened with prosecution of twenty-one different crimes, which could result in sixty years imprisonment and over a million dollars in fines. The FBI agents also questioned Satterwhite on at least one occasion for approximately two hours.

In May, 1994, the FBI abandoned Operation Lightning Strike. A few months later, in August 1994, a federal grand jury indicted Brown for one count of offering a $500 bribe to a public official. The first trial resulted in a mistrial. The United States declined to retry the case and later dismissed the indictment against Brown.

II. PROCEEDINGS

On January 6, 1996, Appellants presented claims to the FBI, the OIG, and the DCIS for injuries suffered from

the undercover operation. On February 22, 1996, Appellants brought this suit in the United States District Court for the Southern District of Texas.

A. Claims

Appellants made claims against the United States, through the actions of the FBI, OIG, and DCIS agents, under the Federal Torts Claim Act ("FTCA") for abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, false imprisonment, and invasion of privacy.

Appellants made *Bivens*[1] claims against FBI agents Francis, Carroll, Jean Barrett Yetman, Michelle Wyckoff, and Sheila Chadwick for due process and Fifth Amendment violations.

Appellants also alleged violations of the federal Racketeering and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961-1968, by Nationsbank, Conn & Company, Dun & Bradstreet, Southern Technologies Diversified, Eastern Tech Manufacturing Corporation, various employees of these private businesses, and FBI agents Carroll, Francis, and Yetman.

Finally, Appellants brought state law claims for: civil conspiracy against ETMC, Nationsbank, Dun & Bradstreet, Conn & Company, Hilton Hotels Corporation, various employees of the private companies and FBI agents Carroll, Francis, and Yetman; invasion of privacy

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

claims against Hilton Hotels and Leisure Hospitality Management Company doing business as Sheraton Hotel-Astrodome; and interference with economic advantage and benefit, intentional infliction of emotional distress, and fraud and deceit claims against all defendants.

B. District Court Decision

The defendants filed, and the district court granted, Motions to Dismiss the Appellants' claims. The district court ruled that the claims for abuse of process and malicious prosecution were barred by the discretionary function exception to the FTCA. The district court ruled that the Appellants' FTCA claims for false imprisonment, assault, intentional infliction of emotional distress, and invasion of privacy were barred by the statute of limitations, as were the Appellants' *Bivens* claims. The district court then found that the Appellants' RICO claims should be dismissed because the Appellees were protected by qualified immunity. Finally, the district court ruled that the Appellants' state tort claims should be dismissed because they were barred by the principle of federal supremacy.

III. DISCUSSION

A. Standard of Review

The district court granted the Appellees' Motions to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). We review the district court's dismissal of a complaint for failure to state a claim for which relief can be granted under FED.R.CIV.P. 12(b)(6) *de novo*. *See Lowrey v. Texas A & M University System*, 117 F.3d 242,

246 (5th Cir.1997). The complaint must be liberally construed in favor of the plaintiff, and all the facts pleaded in the complaint must be taken as true. *See Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir.1986). The district court may not dismiss a complaint under rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (1969).

B. Abuse of Process and Malicious Prosecution Claims

Appellants argue that the district court erred when it dismissed their abuse of process and malicious prosecution claims under the discretionary function exception to the FTCA. The government urges us to affirm on the alternative ground that, as a matter of law, Appellants failed to state malicious prosecution and abuse of process claims. *See Gulf Island, IV v. Blue Streak Marine, Inc.*, 940 F.2d 948, 952 (5th Cir.1991) (In reviewing the district court's order, the appellate court can affirm on any ground presented to the district court, even though it may not have formed the basis for that court's decision.)

1. Malicious Prosecution

The FTCA applies state law to determine the government's liability for torts within the FTCA waiver of immunity. *See* 28 U.S.C. §§ 1346(b), 2674. Under Texas law, there are seven elements for a malicious prosecution claim: (1) commencement of a criminal prosecution against the plaintiff; (2) causation (initiation or procurement) of the action by the defendant; (3) termination of the prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the absence of probable cause for the proceedings; (6) malice in filing the charge; and (7) damage to the plaintiff. *See Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex.1997). The government asserts, and we agree, that Appellants cannot meet the fifth criterion, absence of probable cause.

Brown was indicted for bribing a public official in violation of 18 U.S.C. § 201(b)(1)(A) & (C), which provides:

> (b) Whoever (1) directly or indirectly, corruptly gives . . . anything of value to any public official . . . with intent
>
> (A) to influence any official act; or
>
> (B) to induce such public official . . . to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States;
>
> shall be [subject to criminal liability].

Probable cause is defined as "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant], that the person charged

was guilty of the crime for which he was prosecuted." *Richey*, 952 S.W.2d at 517 (citation omitted) (editing original). If the facts necessary to instigate a criminal prosecution are in dispute, the issue of probable cause is a mixed question of law and fact to be resolved by a jury. Where the facts underlying the decision to prosecute are not disputed, however, then the question of probable cause is a question of law decided by the court. *See Richey*, 952 S.W.2d at 518.

It is undisputed that Brown accepted and delivered an envelope containing money to a United States Army procurement officer at his hotel room. The only dispute concerns Brown's *mens rea* – what he knew or intended. "[T]he complainant's failure to make a further investigation into the suspect's state of mind does not constitute lack of probable cause if all objective elements of a crime reasonably appear to have been completed." *Id.* at 518. Even though the government's evidence might have been weak and the prospects of obtaining a conviction may not have been good, as a matter of law, the government has proffered proof of probable cause, and thus, Appellants have failed to state a claim for malicious prosecution.

2. Abuse of Process

Under Texas law, there are three elements for an abuse of process claim: "(1) that the defendant made an illegal, improper or perverted use of the process, a use neither warranted nor authorized by the process; (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; and (3) that damage resulted to the plaintiff as a

result of such illegal act." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 577 (5th Cir.1996).

Appellants' allegations are fatally defective because they fail to allege use of the process other than the mere institution of the criminal complaint, which was not improper. *See In re Burzynski*, 989 F.2d 733, 739 (5th Cir.1993). Thus, as a matter of law, Appellants have failed to state a claim for abuse of process upon which relief can be granted.

C. RICO Claims

Appellants argue that the district court erred in dismissing their RICO claims against the government agents and private defendants on the basis of qualified immunity. Government officials performing discretionary functions are shielded from "liability for civil damages insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The district court determined that defendants were entitled to qualified immunity from the RICO claims because the Plaintiffs cannot show a violation of statutory rights secured by RICO. Specifically, the district court reasoned that "[t]he FBI agents are not liable for RICO violations in the performance of their duties because there can be no RICO claim against federal officials on account of their alleged official misconduct," citing *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir.1993). The district court misconstrued our holding in *McNeily*, which held that the FDIC cannot be sued under the RICO statute because the FDIC, as a federal agency, is

not chargeable, indictable or punishable for violations of state and federal criminal provisions. *See id.*, relying on *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir.1991). Had the Plaintiffs named the FBI as a defendant to this suit, the district court would have been on firm ground in dismissing RICO claims against that federal agency based on *McNeily*. However, *McNeily* does not support the grant of qualified immunity to the FBI agents or to the private individuals who acted at the direction of those agents. However, if the defendants are entitled to qualified immunity on some alternative ground, we will affirm the district court's dismissal. *See Gulf Island IV*, 940 F.2d at 952.

In assessing a claim of qualified immunity, we must determine whether: (1) the plaintiffs have asserted a constitutional or statutory violation; (2) the law regarding the alleged violation was clearly established at the time of the operative events; and (3) the record shows that the violation occurred, or at least gives rise to "a genuine issue of material fact as to whether the defendant actually engaged in conduct that violated the clearly-established law." *Kerr v. Lyford*, 171 F.3d 330, 338 (5th Cir.1999). If we determine that the official's conduct violated clearly established law, we address whether that conduct was objectively reasonable. *See Wren v. Towe*, 130 F.3d 1154, 1159 (5th Cir.1997).

The Racketeering Influenced and Corrupt Organizations Act ("RICO") imposes criminal and civil liability upon those who engage in "a pattern of racketeering activity" defined as "any act or threat involving" specified state-law crimes, acts indictable under various specified federal statutes, and other federal offenses. *See* 18

U.S.C. § 1961(1). Section 1964(c) allows a private party who has been sustained damages from a RICO violation, to recover those damages. *See* 18 U.S.C. § 1964(c). Appellants' complaint alleges that the Government and private defendants' racketeering activities included mail and wire fraud, which are included among the enumerated predicate acts for a RICO claim. *See* 18 U.S.C. § 1961(1).

We are not persuaded that the Appellants have asserted a violation of statutory rights which were clearly established at the time of the events. In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute did not prohibit schemes that defrauded people of their intangible rights to an honest and impartial government. Following *McNally*, Congress enacted 18 U.S.C. § 1346,[2] which, in one sentence, provided that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." In 1997, the Fifth Circuit, sitting *en banc*, held that, by enacting § 1346, Congress intended to protect the intangible right of honest services from wire fraud schemes by state actors. *See United States v. Brumley*, 116 F.3d 728, 733 (5th Cir.1997) ("fraud statutes cover the deprivation of intangible rights."). However, prior to the *en banc* resolution of *Brumley*, we cannot say that such rights were clearly established by the enactment of § 1346. *See id.* at 736 (dissent) ("It is therefore incomprehensible to us that the majority can conclude . . . that [§ 1346] reflects a clear statement of a Congressional

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[2] Added by Pub.L. 100-690, Title VII, § 7603(a), Nov. 18, 1988, 102 Stat. 4508.

intention to protect the citizenry of a state from corrupt state officials."). Because the rights asserted by Appellants were not clearly established at the time of defendants' alleged acts, we conclude that the district court did not err in dismissing Appellants' RICO claims.

D. Supremacy Clause and State Law Claims

Appellants brought state law claims for civil conspiracy, invasion of privacy, interference with economic advantage and benefit, intentional infliction of emotional distress,[3] and fraud and deceit. Appellants contend that the district court erred when it dismissed the Appellants' state law claims on the ground that they were barred by the federal supremacy clause.[4]

1. Government Agents

The individual agents' immunity from suit under Texas law is not at issue. The Attorney General certified under 28 U.S.C. § 2679(d)(1) that the agents acted within the scope of their employment at the time of the events at issue, thereby substituting the United States as defendant

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[3] Appellants brought two separate claims for intentional infliction of emotional distress. The claims brought pursuant to Texas state law are addressed here. The causes of action seeking relief under the Federal Tort Claims Act are discussed below.

[4] It is not clear from the record before us, and we do not reach the question, whether Appellants' state law claims are governed by the Texas two year statute of limitations, TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 or the four year statute of limitations, TEX. CIV. PRAC. & REM. CODE ANN. § 16.004. *See Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex.1990).

on those claims, *see Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). This procedure is not challenged.

2. Private Defendants

The district court also dismissed Appellants' state law claims against the private defendants under the federal supremacy clause. While this Court has not addressed the issue of whether the supremacy clause preempts state law tort claims against private defendants acting at the direction of the federal government, there is some precedent to guide us.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court considered the issue of whether the supremacy clause preempted state law liability of independent contractors performing work for the federal government. Under *Boyle*, state law may be preempted where: (1) there is a uniquely federal interest and (2) there is a significant conflict between federal policy and the operation of state law. *See Boyle*, 487 U.S. at 504-05, 507.

The liability of private defendants for actions taken at the direction of agents acting within their authority is a unique federal interest. Private businesses and individuals provide invaluable assistance as informants who provide evidence against law violators or, as in this instance, lend credibility to FBI undercover operations. If private businesses were not eligible for immunity from state law claims arising from assisting undercover federal operations, this would provide a major disincentive to assisting law enforcement and would undermine the needs and interests of the federal government.

At issue then, is whether the federal policy conflicts with the operation of state law. If the private defendants committed what would have been illegal acts under state law at the direction and control of agents acting within their authority, the operation of state law would conflict with federal policy. In *Hunter v. Wood*, 209 U.S. 205 (1908), where state law conflicted with a federal court order, the Court precluded a state law prosecution of a railroad clerk who sold tickets pursuant to that order. Similarly, this Court has suggested that federal immunity privilege should be extended to preclude an action against a telephone company who assisted federal law enforcement agents with wiretapping. *See Fowler v. Southern Bell Telephone & Telegraph Co.*, 343 F.2d 150, 156-57 (5th Cir.1965). *See also Connecticut v. Marra*, 528 F.Supp. 381 (D.Conn.1981) (holding that defendant working at direction of FBI was entitled to federal immunity from state law prosecution). State law cannot operate to impede individuals who have government authority and act as is necessary and proper within that authority. *See, e.g., Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

If the private defendants acted in good faith by reasonably relying upon the authority of government agents, their actions are shielded from state law action. In this case, the private defendants, in good faith, supported the FBI's undercover operation with credibility and legitimacy. There has been no suggestion that the private defendants acted maliciously or attempted to derive personal gain from assisting in the operation. Moreover, the private defendants' actions, consistent with the apparent authority granted by the government agents, were objectively reasonable. Under the veil of apparent authority,

the private defendants had no reason to believe that their actions were illegal or would cause injury to the Appellants. Thus, Appellants' state law claims against the private defendants are barred by the supremacy clause.

E. FTCA and *Bivens* Claims: Statute of Limitations

Appellants argue that the district court erred in finding that their FTCA causes of action and *Bivens* claims were barred by the statute of limitations. We affirm the district court's ruling as to Brown and Satterwhite. Although we conclude that the district court erred in holding that Hodgson's *Bivens* claims are time barred, we nevertheless affirm the dismissal of those claims on the basis of qualified immunity.

1. FTCA Claims

The FTCA applies a two-year statute of limitations from the accrual date of the cause of action. *See* 28 U.S.C. § 2401(b). A cause of action accrues, under federal law, "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *See Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir.1994). The plaintiff's knowledge of the injury depends on two elements: (1) the existence of the injury; and (2) the connection between the injury and the defendant's actions. *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir.1995).

After carefully reviewing the Appellants' Second Amended Complaint, we conclude that their claims for

assault, false imprisonment, intentional infliction of emotional distress, and invasion of privacy are barred by the statute of limitations. They rest on allegations of events that occurred in August and September 1993. Appellants presented their claims on January 8, 1996 and January 10, 1996. Because the claims were presented more than two-years after the events giving rise to the complaint, the district court was correct in dismissing them.

2. *Bivens* Claims

We also hold that Brown and Satterwhite's *Bivens* claims for due process and Fifth Amendment violations are barred by the statute of limitations. Under *Bivens*, a person may sue a federal agent for money damages when the federal agent has allegedly violated that person's constitutional rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). A *Bivens* action is controlled by the applicable state statute of limitations. *See Alford v. United States*, 693 F.2d 498, 499 (5th Cir.1982) (per curiam). This Court, applying Texas law, has held that the statute of limitations period on a *Bivens* claim is two years. *See Pena v. United States*, 157 F.3d 984, 987 (5th Cir.1998). Brown became aware that he had been injured by the Defendants' alleged violation of his constitutional rights on August 10, 1993, when the FBI agents revealed to him that he had been expending his time and energy furthering the deceptions of Operation Lightning Strike, rather than his own business interests. Likewise, the pleadings allege that the FBI revealed the undercover scheme to Plaintiff Satterwhite on August 20, 1993. However, we find nothing in the record that establishes when Plaintiff Hodgson was made privy to this

information. We therefore affirm the district court's holding that Brown and Satterwhite's *Bivens* claims are barred by Texas' two-year statute of limitations, but find that we are unable to affirm the district court's dismissal of Hodgson's *Bivens* claims on statute of limitations grounds.

3. Qualified immunity

Although neither the pleadings, the district court's order nor the briefs develop the analysis, it is obvious that defendants have a qualified immunity defense to the *Bivens* claims. Therefore, in the interest of judicial economy, we affirm the dismissal of Hodgson's *Bivens* claims on that alternative ground. *See Gulf Island, IV*, 940 F.2d at 952.

"Governmental officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct [does] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wyatt v. Cole*, 504 U.S. 158, 166 (1992). Hodgson's *Bivens* claims are bottomed on defendants' alleged violations of his constitutional due process rights.[5]

No court has addressed the particular issue presented by this case: the specific limits on federal agents' authority in undercover operations. The district court

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[5] Brown and Satterwhite brought additional *Bivens* claims based on violations of their rights to remain silent and to consult with an attorney during their encounters with agents. Hodgson makes no allegation that he suffered similar violations.

found no limits on the power of federal agents operating under cover, reasoning that if Appellants are allowed to pursue state law causes of action it would "effectively stop" federal undercover operations because, "by their very nature [they] seek to invade the privacy of those who violate the law." The district court went on to hold, without citation to authority, that "[t]he constitutional structure of our federal system does not permit private litigants to police federal law enforcement activities by asserting state law claims against federal law enforcement agencies or their agents." The district court erred: it asked the wrong question and reached the wrong conclusion.

The district court should have asked whether it was constitutionally permissible for federal agents to inflict damages on innocent non-targets[6] during an undercover operation and refuse them compensation. Because the Fifth Amendment due process guarantee against conscience-shocking injury imposes clear limits on law enforcement conduct, we conclude that it was neither necessary nor proper for the defendants in this case to destroy the lives and businesses of innocent non-targets in the name of law enforcement.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Due Process Clause was intended to prevent government officials from abusing their power or employing it as an instrument of

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[6] We emphasize at the outset that the legitimacy of the operation vis-a-vis those who violate the law, i.e. the targets of Operation Lightning Strike, is not at issue in this analysis.

oppression. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992). The cognizable level of executive abuse of power is that which "shocks the conscience," violates the "decencies of civilized conduct" or interferes with rights "implicit in the concept of ordered liberty." *Rochin v. California*, 342 U.S. 165, 209-210 (1952). Obviously, this guarantee of due process protects citizens against deliberate harm from government officials. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986). Allegations of lesser culpability have been held adequate to state a claim in some circumstances. For example, deliberate indifference suffices to impose due process liability when government actors fail to provide adequate care for pretrial detainees with serious medical needs. *See Hare v. City of Corinth*, 74 F.3d 633 (5th Cir.1996) (en banc). However, harm inflicted due to government actors' simple negligence is categorically beneath the threshold of constitutional due process. *See Daniels*, 474 U.S. at 328.

The Supreme Court recently provided a road map for navigating mid-level-culpability due process claims. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), parents of a motorcycle passenger killed in a high-speed police chase brought a 42 U.S.C. § 1983 action against the officer and governmental agencies involved, alleging deprivation of their decedent's substantive due process right to life. *Lewis*, 118 S.Ct. 1708, 1712. The Supreme Court rejected the plaintiff's contention that proof of deliberate indifference by the officer would be sufficient to establish a due process violation. *Id.* at 1711. "A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-

speed threat to everyone within stopping range, be they suspects, their passengers, other drivers or bystanders." *Id.* at 1720. Analogizing the circumstances of a police chase to the situation of officers called on to quell a prison riot, the Supreme Court held that " '[a] deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.' " *Id.* at 1720, quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986). The court went on to distinguish situations where mid-level fault was sufficient to impose liability. For example, liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. *See Lewis*, 118 S.Ct. at 1720. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.' " *Id.*, quoting *Daniels v. Williams*, 474 U.S. at 332.

Applying the *Lewis* analysis to the FBI's alleged activity in this case, we conclude that the FBI made decisions which harmed the Plaintiffs after ample opportunity for cool reflection. In fact, they invested almost two years and thousands of man hours in developing the sting operation. Thus, the due process clause protects the

Plaintiffs from any harm that arose from the officers' deliberate indifference. The facts, as pleaded, establish at least that level of federal agent culpability as Operation Lightning Strike evolved into a disastrous boondoggle. We therefore hold that Hodgson's allegations that federal agents inflicted damages on him, an innocent non-target, during this particular undercover operation and refused him compensation states a claim under *Bivens*.

However, because we address today for the first time the parameters of due process protections afforded innocent third parties injured by law enforcement sting operations run amok, and because the Supreme Court's language that drives our analysis appeared in a case decided in 1998, we cannot say that the due process rights claimed by Hodgson were clearly established during 1992-94. *See Lewis*, 523 U.S. 833. We therefore affirm the district court's dismissal of Hodgson's *Bivens* claims on the alternative basis of qualified immunity.

IV. CONCLUSION

Based on the foregoing, we affirm the district court's dismissal of Appellants' suit.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DALE A. BROWN, et al., Plaintiffs, vs. NATIONSBANK CORP., et al., Defendants.	CIVIL ACTION NO. G-96-112

MEMORANDUM ON MOTIONS TO DISMISS

(Filed Jul. 30, 1997)

Pending before the Court are Defendant Hilton Hotels Corporation's Motion to Dismiss (Instrument No. 43), Motion to Dismiss by Defendants Conn & Co., Joe Doe Conn & Co. Employee Defendant, Dun & Bradstreet Corporation, John Doe Dun & Bradstreet Corporation Employee Defendant, Jane Doe Dun & Bradstreet Corporation Defendant, Jody Jones and Nationsbank, the United States' Suggestion of Dismissal as to All of Plaintiffs' Claims (Instrument No. 54), Defendants the United States and Southern Technologies Diversified L.P.'s Motion to Dismiss (Instrument No. 55), Defendants James Harold Francis, Joseph E. Carroll, Jean Barrett Yetman, Sheila Chadwick, and Michelle Wyckoff's Motion to Dismiss (Instrument No. 57), and Defendant Hilton Motels Corporation's Motion to Dismiss (Instrument No. 61). After considering the motions, memorandum, responses, and arguments presented on the motions at the hearing

on May 16, 1997, the Court finds that the motions to dismiss should be granted.

I. Facts.

The Plaintiffs filed their original complaint in this case on February 22, 1996. Their first amended complaint was filed on June 31, 1996. The Plaintiffs, owners and operators of two engineering and management companies, claim that they were injured by a Federal Bureau of Investigation ("FBI") undercover operation that began in the Fall of 1991, code-named "Operation Lightning Strike." (Pls.' Am. Compl. ¶¶ 39-42.) In their amended complaint, the Plaintiffs state that "[t]he purpose of the undercover investigation was to investigate and discover any illegal activity being committed by [National Aeronautics and Space Administration ("NASA")] employees or its aerospace industry contractors in the contract procurement process." *Id.* ¶ 40. The Plaintiffs claim that during the investigation the FBI, the Office of the Inspector General ("OIG"), the Defense Contractor Investigative Service ("DCIS"), and the named Defendant corporations and their employees conspired to create an elaborate fraud, replete with the appearance of ready cash, a wealthy investor, and a thriving company anxious to do business with them, and "lured [the Plaintiffs] into a world of deceit and entrapment, which caused [them] to lose their businesses, professional reputations, and future business opportunities, as well as caused them to sustain physical and mental injuries." *Id.* ¶ 44-48. The Plaintiffs also claim that they were subjected to illegal interrogations by Defendant FBI agent. *Id.* ¶ 201.

The Plaintiffs bring a number of claims against the Defendants. They allege violations of the Racketeering Influenced and Corrupt Practices Act ("RICO"), 18 U.S.C. §§ 1961-1968, by Defendants Nationsbank Corporation ("Nationsbank"), Jody Jones ("Jones"), Eastern Tech Manufacturing Corporation ("ETMC"), Larry Seiler ("Seiler"), Charles E. Hess ("Hess"), John Doe Technical Manager, John Doe Genrad Technician, John Doe Plant Manager, Jane Doe Technical Liaison, John Doe Bonded Security Guard, Conn & Company ("Conn"), Jane Doe-Conn Employee, John Doe-Conn Employee, Dun & Bradstreet Corporation ("D&B"), Jane Doe-D&B Employee, John Doe-D&B Employee, Southern Technologies Diversified, L.P., FBI Agent James H. Francis ("Francis"), FBI Agent Joseph E. Carroll ("Carroll"), and FBI Agent Jean Barrett Yetman ("Yetman"), *Id.* ¶¶ 118-135. The Plaintiffs bring state law claims for civil conspiracy against Defendants ETMC, Seiler, Hess, John Doe technical Manager, Joe Doe Genrad Technician, John Doe Plant Manager, Jane Doe Technical Liaison, John Doe Bonded Security Guard, Nationsbank, Jones, Joe Doe-D&B Employee, Jane Doe-D&B Employee, Conn, John Doe-Conn Employee, Jane Doe-Conn Employee, Hilton Hotels Corporation ("Hilton"), and the named FBI agent Defendants, *id.* ¶¶ 136-145; intentional infliction of emotional distress against the Defendants, *id.* ¶ 146; fraud and deceit against the Defendants, *id.* ¶ 147; invasion of privacy against Defendants Hilton and Leisure Hospitality Management Company d/b/a Sheraton Hotel-Astrodome, *id.* ¶¶ 148-152; and interference with economic advantage and benefit against the Defendants, *id.* ¶¶ 153-154. The Plaintiffs make claims against the Defendant United

States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, for false imprisonment, abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, and invasion of privacy. *Id.* ¶¶ 155-191. They also make claims against the Defendant FBI agents Francis, Carroll, Yetman, Michelle Wyckoff, and Shelia Chadwick for constitutional violations. *Id.* ¶¶ 192-201.

II. Discussion.

A. RICO Claims.

The Plaintiffs' RICO claims are dismissed because the Defendants are protected by qualified immunity for their actions. "[G]overnment officials performing discretionary functions are Shielded from liability for civil damages insofar as their conduct [does] not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (citations omitted) (emphasis added). Here, according to the Plaintiffs' own pleadings, the Defendant FBI agents were participating in the alleged scheme to ensnare the Plaintiffs and violate their statutory rights under RICO in their capacity as government officials and the nongovernmental defendants were assisting the Defendant FBI agents because of their status as government officials. (Pls.' Am. Compl. ¶ 44) (stating that "[d]uring the three year investigation, the FBI, OIG, and DCIS, with the help of Defendant[ ] [corporations] . . . and their respective employees named as Defendants in this case, engaged in an ongoing fraudulent, deceitful pattern of activity violating Plaintiffs'

rights under . . . the laws of the United States"). The FBI agents are not liable for RICO violations in the performance of their duties because there can be no RICO claim against federal officials on account of their alleged official misconduct. *McNeily v. United States*, 6 F.3d 343, 350 (5th Cir. 1993) (holding federal agency may not by sued under the RICO statute); *Hefti v. McGrath*, 784 F. Supp. 1426, 1433 (E.D. Mo. 1992) (finding that a RICO claim does not lie against federal officials on account of their alleged official misconduct). The FBI is not "chargeable", "indictable", or "punishable" for violations of specific state and federal crimes. *McNeily*, 6 F.3d at 350. The Plaintiffs, therefore, cannot meet the requirement of showing a "racketeering activity," which is the predicate for a civil RICO action. *Id.* (citations omitted).

Like the Defendant FBI agents, the private Defendants are also protected by qualified immunity from the Plaintiffs' RICO claims. Private individuals who perform government functions pursuant to the request of a government official are entitled to qualified immunity if a government official would have been entitled to perform such a function himself. *Eagon v. City of Elk City, Okla.*, 72 F.3d 1480, 1489 (10th Cir. 1996); *Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993). *Cf. Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir. 1993) (on remand) (holding that private defendants invoking a state attachment statute may be held liable for damages under 28 U.S.C. § 1983 only if they failed to act in good faith in invoking unconstitutional state procedures). *See generally Richardson v. McKnight*, No. 96-318, 1997 WL 338548, at *9 (U.S. S. Ct. June 23, 1997) (limiting the holding in an opinion that found that private prison

management firms were not entitled to qualified immunity from § 1983 lawsuits to cases that "[do] not involve a private individual briefly associated with a government body, serving as an adjunct to a government in an essential governmental activity, or acting under close official supervision."). The acts by the private Defendants giving rise to the Plaintiffs' RICO claims were made at the behest of the Defendant FBI agents. (Pls.' Am. Compl. ¶¶ 40-44.) Because the Defendant FBI agents are protected by qualified immunity from the Plaintiffs' RICO claims, the private Defendants acting at their request are also protected from these claims.

B. State Tort Claims.

The Plaintiffs' state tort claims are barred by the principle of federal supremacy. U.S. Const. art. VI, cl. 2. Over a century ago, in a case in which a Deputy United States Marshal was held on state murder charges by a sheriff in California after he shot and killed an individual attempting to assault the Supreme Court Justice that he was charged with protecting, the Supreme Court established that a federal officer cannot be held on a state criminal charge where the alleged crime arose during the performance of his federal duties and was necessary and proper to the performance of those duties. *In re Neagle*, 135 U.S. 1, 75 (1890). More recently, the Court has stated that state law claims that stand as an obstacle to the accomplishment of the lawful objectives of a federal agency acting in the scope of its congressionally delegated authority are preempted by federal law. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). Here, the state law tort claims made by the Plaintiffs are

impediments to federal law enforcement officers' conduct of undercover investigations of federal crime. If the allegations made by the Plaintiffs are true, the Defendants would have to account for a number of state law claims against them as a result of their participation in the FBI's undercover investigation aimed at discovering crimes committed by NASA employees and contractors, including fraud, deceit, and invasion of privacy. To allow the prosecution of such state law actions against the Defendants would effectively stop the federal government from pursuing the lawful objective of ferreting out the violation of federal crimes through the use of undercover investigations. Deception and subterfuge are the warp and weft of undercover investigations that by their very nature seek to invade the privacy of those who violate the law. The constitutional structure of our federal system does not permit private litigants to police federal law enforcement activities by asserting state law claims against federal law enforcement agencies or their agents. No matter how sympathetic the facts before the Court or degree of injustice suffered by the Plaintiffs, the Court cannot find such a power.

The private Defendants are also entitled to immunity from the Plaintiffs' state law tort claims because of the principle of federal supremacy. "[F]ederal immunity from state prosecution is not limited to a particular class of federal officers or to paid employees of the federal government. Rather, it extends to any person, including a private citizen like defendant, who acts under the direction and control of federal authorities or pursuant to federal law." *Connecticut v. Marra*, 528 F. Supp. 381, 385 (D. Conn. 1981). In *Boyle v. United Techs. Corp.*, 487 U.S.

500, 505-07 (1988), the Court found that federal law displaced state law liability on federal government contractors because such liability would directly affect the terms of government contracts, causing a direct affect on federal interests. Similarly, immunity for the private Defendants for the Plaintiffs' state law tort claims is warranted here because the imposition of civil liability for private parties for their actions in assisting federal agents conduct undercover investigations would be a major disincentive to private citizens providing assistance to federal agents and would directly affect the interests of the federal government.

C. FTCA Claims.

The Plaintiffs make claims against the Defendant United States of America under the Federal Tort claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, for false imprisonment, abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, and invasion of privacy. (Pls.' Am. Compl. ¶¶ 155-191.) The Plaintiffs' claims for false imprisonment, assault, intentional infliction of emotional distress, and invasion of privacy are barred by the statute of limitations on tort claims against the federal government. The Plaintiffs' claims for abuse of process and malicious prosecution are barred by the discretionary function exception to the FTCA.

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). "Under federal law, a cause of action accrues when the plaintiff knows or has reason

to know of the injury which is the basis of the action." *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994) (citations omitted). A plaintiff's awareness that he has suffered an injury consists of two elements: "(1) [t]he existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

According to the Plaintiffs, notice of their FTCA claims was received by the FBI and the OIG on January 8, 1996, and by the DCIS on January 11, 1996. (Pls.' Am. Compl. ¶ 32.) Plaintiff Dale A. Brown's ("Brown") claim of false imprisonment was based on allegations that federal employees held him against his will on August 4, 8, 10, 20, 30, and September 10, 20, 1993. (Pls.' Am. Compl. ¶¶ 155-163.) Plaintiff R. Scott Satterwhite's ("Satterwhite") claim of false imprisonment was based on an incident he alleges occurred on August 20, 1993. *Id.* ¶ 164. Plaintiff Brown's assault claim is based on acts that he alleges occurred on August 4, 1993. *Id.* ¶¶ 177-179. Plaintiffs Brown and Satterwhite's intentional infliction of emotional distress claim is based on an interrogation they allege occurred on August 4, 1993 and on allegation of misrepresentations by FBI employees from October 1992 to March 1993. *Id.* ¶¶ 181-185. The Plaintiffs became aware that they were the targets of the government's undercover investigation by August 1993, *id.* ¶¶ 98-105, at which time they had sufficient information to be placed on notice that they should investigate whether they had a claim of invasion of privacy. Because the Plaintiffs failed to bring these claims within two years of

becoming aware or having reason to become aware of their injuries they are barred by the statute of limitations.

The FTCA bars "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Plaintiff Brown brings claims against the Defendant United States for abuse of process and malicious prosecution for issuing a criminal complaint against him and seeking to prosecute him. Few possible claims could fall as squarely within the FTCA discretionary function exception as those directly challenging the Attorney General's decision to indict and prosecute Plaintiff Brown. These two claims are accordingly barred.

D. Constitutional Claims.

The Plaintiffs' claims that their due process rights and their Fifth Amendment rights to remain silent and to consult with an attorney were violated are time-barred. Plaintiffs constitutional claims are governed by Texas's two-year statute of limitations. *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992). Plaintiff Brown became aware that he had been injured by the Defendants' alleged violation of his due process rights on August 10, 1993. (Pls.' Am. Compl. ¶ 197.) Brown became aware that his Fifth Amendment rights had been allegedly violated on September 20, 1993, at the latest. *Id.* ¶ 201. Satterwhite became aware of his alleged injury on August 20, 1993. *Id.* The Plaintiffs filed this action on February 22, 1996. All of

the Plaintiffs' constitutional claims are barred by the statute of limitations.

SIGNED at Houston, Texas, this 28th day of July 1997.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DALE A. BROWN, et al., Plaintiffs, vs. NATIONSBANK CORP., et al., Defendants.	CIVIL ACTION NO. G-96-112

FINAL JUDGMENT

(Filed Jul. 30, 1997)

Defendants' motions to dismiss having been decided by the Court in the Memorandum on Motions to Dismiss singed this day, the Court

ORDERS that all the Plaintiffs' claims against the Defendants are DISMISSED WITH PREJUDICE, and the

Defendants shall recover from the Plaintiffs their costs of action.

SIGNED at Houston, Texas, this 28th day of July 1997.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41214

DALE A BROWN; ET AL
Plaintiffs

DALE A BROWN; R SCOTT SATTERWHITE; ANTHONY P HODGSON

Plaintiffs – Appellants

v.

NATIONSBANK CORPORATION; ET AL

Defendants

NATIONSBANK CORPORATION; JODIE JONES; CONN & COMPANY; SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P.; HAL FRANCIS, also known as John Clifford; JOSEPH CARROLL, also known as Joe Carson; HILTON HOTELS; LEISURE HOSPITALITY MANAGEMENT COMPANY doing business as Sheraton Hotel-Astrodome; UNITED STATES OF AMERICA

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas, Galveston

ON PETITION FOR REHEARING

(Filed Nov. 12, 1999)

Before DAVIS, STEWART, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-5011

February 15, 2000

Mr. Walter Arnold Carr
515 Spencer Highway
South Houston, TX 77587

Re: Dale A. Brown, R. Scott Satterwhite
and Anthony P. Hodgson
v. Nationsbank Corporation, et al.
Application No. 99A649

Dear Mr. Carr:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on February 15, 2000, extended the time to and including February 24, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

NOTIFICATION LIST

Mr. Walter Arnold Carr
515 Spencer Highway
South Houston, TX 77587

Mr. Richard Montague
P.O. Box 7146
U.S. Dept. of Justice
Washington, DC 20044

Mr. Steven Michael Duble
1200 Smith Street
400 Two Allen Center
Houtson, TX 77002

Clerk
United States Court of Appeals for
the Fifth Circuit
600 Camp Street, Room 100
New Orleans, LA 70130

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DALE A. BROWN, R. SCOTT SATTERWHITE, and ANTHONY P. HODGSON	§	
VS.	§	
UNITED STATES OF AMERICA, NATIONSBANK CORPORATION, JODY JONES, EASTERN TECH MANUFACTURING CORPORATION, LARRY SEILER, CHARLES E. HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON, JOHN DOE BONDED SECURITY GUARD, CONN & COMPANY, JANE DOE-CONN & COMPANY EMPLOYEE, JOHN DOE-CONN & COMPANY EMPLOYEE, DUN & BRADSTREET, JANE DOE-DUN & BRADSTREET EMPLOYEE, JOHN DOE-DUN & BRADSTREET EMPLOYEE, SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P., JAMES H. FRANCIS, JOSEPH E. CARROLL, JEAN BARRETT YETMAN, MICHELLE WYCKOFF, SHEILA CHADWICK, HILTON HOTELS CORPORATION and LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME	§	CIVIL ACTION NO. G-96-0112

PLAINTIFFS' FIRST AMENDED COMPLAINT

1. DALE A. BROWN, R. SCOTT SATTERWHITE and ANTHONY P. HODGSON, Plaintiffs, file this their First Amended Complaint complaining of the UNITED STATES OF AMERICA, NATIONSBANK CORPORATION, JODY JONES, EASTERN TECH MANUFACTURING CORPORATION, LARRY SEILER, CHARLES E. HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON, JOHN DOE BONDED SECURITY GUARD, CONN & COMPANY, JANE DOE-CONN & COMPANY EMPLOYEE, JOHN DOE-CONN & COMPANY EMPLOYEE, DUN & BRADSTREET, JANE DOE-DUN & BRADSTREET EMPLOYEE, JOHN DOE-DUN & BRADSTREET EMPLOYEE, SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P., JAMES H. FRANCIS, JOSEPH E. CARROLL, JEAN BARRETT YETMAN, MICHELLE WYCKOFF, SHEILA CHADWICK, HILTON HOTELS CORPORATION and LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME, Defendants, and for cause of action would show the following:

2. Plaintiff, DALE A. BROWN, is a citizen of the State of Texas, residing in San Leon, Galveston County, Texas.

3. Plaintiff, R. SCOTT SATTERWHITE, is a citizen of the State of Texas, residing in Nassau Bay, Harris County, Texas.

4. Plaintiff, ANTHONY P. HODGSON, is a citizen of the State of Texas, residing in League City, Galveston County, Texas.

5. Defendant, the UNITED STATES OF AMERICA, can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint to the Attorney General of the United States,

Janet Reno, and the United States Attorney for the Southern District, Gaynelle Griffin Jones.

6. Defendant, NATIONSBANK CORPORATION, is a corporation existing under and by virtue of the laws of the State of Delaware. Defendant, NATIONSBANK, has answered and appeared in this suit.

7. Defendant, JODY JONES, is a citizen of the State of Georgia. Defendant JODY JONES has answered and appeared in this suit.

8. Defendant, EASTERN TECH MANUFACTURING CORPORATION, is a corporation existing under and by virtue of the laws of the State of Maryland and has its principal place of business in the State of Maryland. Defendant, EASTERN TECH MANUFACTURING CORPORATION, can be served with process by serving summons and Plaintiffs' First Amended Complaint to its agent for service Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

9. Defendant, LARRY SEILER, is a citizen of the State of Maryland and can be served with process by serving summons and a copy of the Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

10. Defendant, CHARLES E. HESS, is a citizen of the State of Maryland and can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

11. Defendant, JOHN DOE TECHNICAL MANAGER, is a citizen of the State of Maryland and can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

12. Defendant, JOHN DOE GENRAD TECHNICIAN, is a citizen of the State of Maryland and can be served

with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

13. Defendant, JOHN DOE PLANT MANAGER, is a citizen of the State of Maryland and can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

14. Defendant, JANE DOE TECHNICAL LIAISON, is a citizen of the State of Maryland and can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

15. Defendant, JOHN DOE BONDED SECURITY GUARD, is a citizen of the State of Maryland and can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint on Mr. Lawrence Seiler, 9693 Gerwig Lane, Columbia, Maryland, 21046.

16. Defendant, CONN & COMPANY, is a corporation existing under and by virtue of the laws of the State of Georgia. Defendant, CONN & COMPANY, has appeared in this suit.

17. Defendant, JANE DOE-CONN & COMPANY EMPLOYEE, is a citizen of the State of Georgia and has appeared in this suit.

18. Defendant, JOHN DOE-CONN & COMPANY EMPLOYEE, is a citizen of the State of Georgia and has appeared in this suit.

19. Defendant, DUN & BRADSTREET CORPORATION, is a corporation existing under and by virtue of the laws of the State of Delaware. Defendant, DUN & BRADSTREET CORPORATION, has appeared in this suit.

20. Defendant, JANE DOE-DUN & BRADSTREET CORPORATION EMPLOYEE, is a citizen of the State of Delaware and has appeared in this suit.

21. Defendant, JOHN DOE-DUN & BRADSTREET CORPORATION EMPLOYEE, is a citizen of the State of Delaware and has appeared in this suit.

22. Defendant, SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P., is a corporation existing under and by virtue of the laws of the State of Georgia. Defendant, SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P., has appeared in this suit.

23. Defendant, JAMES H. FRANCIS, is a citizen of the United States, residing in the State of Texas and has appeared in this suit.

24. Defendant, JOSEPH E. CARROLL, is a citizen of the State of Georgia and has appeared in this suit.

25. Defendant, JEAN BARRETT YETMAN, is a citizen of the United States and has appeared in this suit.

26. Defendant, MICHELLE WYCKOFF, is a citizen of the United States and may served with process by serving summons and one copy of Plaintiffs' First Amended Complaint to Cynthia A. Rosenthal, U.S. Department of Justice, Federal Bureau of Investigation, 2500 East T.C. Jester, Suite 200, Houston, Texas 77008.

27. Defendant, SHEILA CHADWICK, is a citizen of the United States and may served with process by serving summons and one copy of Plaintiffs' First Amended Complaint to Cynthia A. Rosenthal, U.S. Department of Justice, Federal Bureau of Investigation, 2500 East T.C. Jester, Suite 200, Houston, Texas 77008.

28. Defendant, HILTON HOTELS CORPORATION, is a corporation existing under and by virtue of the laws of the State of California. Defendant, HILTON HOTELS CORPORATION, has appeared and answered in this suit.

29. Defendant, LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME, is a corporation existing under and by virtue of the laws of the State of Delaware. Defendant, LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME, can be served with process by serving summons and one copy of Plaintiffs' First Amended Complaint to its agent for service, C.T. Corporations Systems, 811 Dallas Avenue, Houston, Texas, 77002.

SUMMARY OF THE CASE

30. Plaintiffs allege Defendants engaged in numerous acts, including those which constitute violations of 18 U.S.C. § 1961 *et seq.*, the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), civil conspiracy, intentional infliction of emotional distress, fraud and deceit, invasion of privacy, and interference with economic advantage and benefit under the common law of Texas, as well as illegal activity in violation of 28 U.S.C. § 2671 *et seq.*, the Federal Tort Claims Act ("FTCA"), and the United States Constitution. The continuing and ongoing course of conduct proximately caused the resulting monetary and physical injuries and damages to Plaintiffs.

31. All conditions precedent to the filing of this lawsuit have been complied with and/or have occurred.

32. On January 6, 1996, Plaintiffs submitted a claim based on the allegations herein in the amount of fifty (50) million dollars, each, to the Federal Bureau of Investigation ("FBI"), National Aeronautics and Space Administration, Office of Inspector General ("OIG"), and Defense Contractor Investigative Service ("DCIS"). Such notice was received by the FBI and the OIG on January 8, 1996. Notice was received by the DCIS on January 11, 1996.

33. By July 15, 1996, the FBI, OIG, and DCIS had neither accepted nor rejected the claim. Therefore, pursuant to 28 U.S.C. § 2675(a), Plaintiffs elect to consider the failure to act as a final denial of the claim.

JURISDICTION

34. This Court has exclusive jurisdiction under 28 U.S.C. § 1346(b) because Plaintiffs are bringing this complaint against the United States alleging a violation of their rights under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*

35. Also, this Court has jurisdiction under 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331. Plaintiffs are alleging, among others, a violation of their rights under Title IX of the Organized Crime Control Act of 1970, as amended 18 U.S.C. § 1961 *et seq.* (RICO).

36. Further, this Court has jurisdiction pursuant to 28 U.S.C. § 1332 based upon the diverse citizenship of the parties. The amount in controversy exceeds the sum or value of $50,000 exclusive of interest and costs.

VENUE

37. Venue is proper in Galveston County, Texas pursuant to 28 U.S.C. § 1402(b) because Galveston County is the district where Plaintiffs reside. Additionally venue is proper under 28 U.S.C. §§ 1391(b) and (e), because Galveston County is the judicial district where a substantial part of the events or omissions giving rise to the claims occurred.

FACTS

38. At the time the actions occurred which form the basis of this suit, Plaintiffs DALE A. BROWN ("BROWN"), R. SCOTT SATTERWHITE ("SATTERWHITE"), and ANTHONY Plaintiff. HODGSON

("HODGSON") enjoyed a well-respected reputation within National Aeronautics and Space Administration-Johnson Space Center ("NASA") and the aerospace community. Plaintiffs were regarded as competent, honest, credible and effective leaders in the industry. It was essential to Plaintiffs' livelihood and professional standing to maintain this reputation.

39. Prior to and during the illegal conduct of the Defendants, Plaintiffs owned and operated two corporations: TerraSpace, Inc. and TerraSpace Technology, Inc. These companies were high-tech engineering and management companies that provided products and services to the private sector and government sector, respectively. TerraSpace, Inc. was awarded several engineering and management contracts with private companies prior to and during the period of time that Defendants conducted their pattern of illegal activity. TerraSpace Technology, Inc. was awarded several engineering and software development contracts with Fortune 500 aerospace firms, and was awarded a multi-million dollar Space Shuttle software development contract, thereby assuring rapid growth and success.

40. The actions which form the basis of this suit center around a Federal Bureau of Investigation ("FBI") undercover operation, code-named "Operation Lightning Strike," aimed at NASA. The purpose of the undercover investigation was to investigate and discover any illegal activity being committed by NASA employees or its aerospace industry contractors in the contract procurement process.

41. The United States Attorney's Office for the Southern District of Texas advised the FBI throughout the operation.

42. Operation Lightning Strike began in the Fall of 1991.

43. The operation remained covert for approximately three years, until a press conference held on February 24, 1994. At this time, the FBI and the United States Attorney's Office revealed the operation and announced that several corporations and individuals would face criminal charges.

44. During the course of the three (3) year investigation, the FBI, Office of the Inspector General ("OIG"), and Defense Contractor Investigative Service ("DCIS"), with the help of Defendants NATIONSBANK CORPORATION ("NATIONSBANK"), EASTERN TECH MANUFACTURING CORPORATION ("ETMC"), DUN & BRADSTREET CORPORATION ("D&B"), CONN & COMPANY ("CONN"), HILTON HOTELS CORPORATION ("HILTON") and LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME ("SHERATON" OR "SHERATON HOTEL-ASTRODOME"), and their respective employees named as Defendants in this case, engaged in an ongoing fraudulent, deceitful pattern of activity violating Plaintiffs' rights under the United States Constitution; the laws of the United States; and the laws of Texas; causing Plaintiffs to be lured into a world of deceit and entrapment, which caused Plaintiffs to lose their businesses, professional reputations, and future business opportunities, as well as caused them to sustain physical and mental injuries.

45. Defendants created, maintained and/or published false, misleading, deceptive and fraudulent information and/or knowingly and intentionally misrepresented material facts and circumstances upon which Plaintiffs, in good faith, relied.

46. Working in coordination with the OIG, DCIS and the federal attorneys in the United States Southern District, Defendant, FBI agent, JAMES H. FRANCIS ("FRANCIS"), assumed the lead undercover role of

"John Clifford," a wealthy investor hoping to market cutting-edge electronics to NASA and the aerospace industry.

47. FRANCIS, posing as wealthy investor "John Clifford," initiated contact with Plaintiffs on or about May, 1992. Plaintiffs were not a target of the FBI investigation, but were to be used by the undercover agents to meet the targets within the NASA community.

48. FRANCIS claimed that he was looking for developers for a miniaturized medical device that would help astronauts survive in space. FRANCIS proposed that a Houston aerospace firm form a partnership with ETMC to gain multi-million dollar contracts with NASA and its contractors. FRANCIS promised venture capital to start commercial and government projects and promised over a million dollars in cash for business, engineering, and technical services. Numerous other fraudulent deals were created to try to lure Plaintiffs and other aerospace workers into performing crimes.

49. Plaintiffs were not predisposed to commit a crime and had no purpose or intent to engage in any lawful activity. However, Defendants fraudulent representations to plant and create a criminal intent in Plaintiffs' minds when Plaintiffs' had no such intent or purpose.

50. On or about July 9, 1992, Defendant FBI agent FRANCIS initiated a meeting with Plaintiff BROWN, at which time FRANCIS offered BROWN the position of Chief Financial Officer and Vice President of Marketing for Space, Inc., FRANCIS' front company. FRANCIS offered BROWN a monthly salary of $5,000.00, plus expenses, and said that payments would be made through SOUTHERN TECHNOLOGIES DIVERSIFIED ("STD").

51. Defendant FRANCIS promised venture capital to support TerraSpace, Inc. and TerraSpace Technology, Inc. Plaintiffs agreed it was in their best interest to establish a business relationship with FRANCIS, who they believed to be a legitimate and promising investor.

52. From on or about August 1, 1992 to on or about March 10, 1993, BROWN, under FRANCIS' direction, made hundreds of presentations as Chief Financial Officer and Vice President of Marketing for Space, Inc., the FBI's "front-company."

53. FRANCIS directed BROWN to merge the financial summaries of business entities allegedly owned by FRANCIS with the financial summary of Space, Inc. to reflect the combined resources of FRANCIS' growing "conglomerate." FRANCIS provided BROWN with the detailed balance sheets, income statements and other significant accounting data necessary to perform this task.

54. On or about August 1, 1992, Defendant FRANCIS paid BROWN his first paycheck, drawn on Defendant STD's account. Later, FRANCIS paid BROWN with a check for expenses that was returned for insufficient funds. Thereafter, FRANCIS paid BROWN only in cash, refusing to pay BROWN by check.

55. FRANCIS subsequently taped, both video and audio, the occasions when BROWN received his pay in order to later misconstrue these innocent transactions.

56. Defendant STD made misrepresentations to Plaintiffs and others in the NASA community regarding its solvency and its capabilities.

57. Defendants NATIONSBANK, D&B, and CONN first began their ongoing fraudulent, deceitful pattern of activity on or about May 1992 when they knowingly and intentionally gave fictitious and fraudulent information to the Plaintiffs upon Plaintiffs'

request for information about STD, EASTERN TECH MANUFACTURING ("ETMC"), John Clifford, a.k.a. JAMES H. FRANCIS and Joe Carson, a.k.a. JOSEPH E. CARROLL. CARROLL posed as "Clifford's" business partner, "Joe Carson." This pattern of activity continued for approximately two (2) years.

58. On or about July 1992, Plaintiff BROWN contacted Defendants CONN, D&B, and NATIONSBANK to verify financial information given to Plaintiff by undercover FBI agent FRANCIS (a.k.a. investor John Clifford). At this time, these Defendants knowingly and intentionally gave fraudulent information to Plaintiff, supporting the creation of a fraudulent company with fraudulent, grossly overestimated net worth and gross sales. This financial information also included fraudulent and misleading statements about the individuals involved with the company as its president, vice-president and partners. Additionally, it contained fraudulent and misleading information regarding the marketing and sales information concerning ETMC and STD.

59. The information given to Plaintiffs contained financial information which was unsubstantiated, false, misleading, deceptive and financially incorrect. Plaintiffs relied on this information in good faith when making business decisions.

60. On or about April 15, 1992, Defendant JODY JONES, as vice-president of NATIONSBANK intentionally misrepresented to Plaintiff BROWN'S business partner, Neal Jackson, documents purporting to support that "Clifford" and "Carson" d/b/a STD had a one million dollar line of credit with NATIONSBANK to support the miniaturized lithotripter project. She further fraudulently represented that the two businessmen had accounts with NATIONSBANK totaling one hundred-thirty (130) million dollars.

61. This information was again confirmed and misrepresented by Defendant, JODY JONES, to BROWN during the months of April and May 1992.

62. On or about July, 1992, Defendant, CONN, knowingly and intentionally confirmed the veracity of a fraudulent accounting report for the year ending 1991 to BROWN, for use in developing a financial plan for the newly reorganized Space, Inc. This accounting report fraudulently reflected the assets and liabilities of STD. Furthermore, CONN intentionally and knowingly misrepresented to BROWN that CONN had been the accounting firm for STD for more than four (4) years. Additionally, CONN confirmed that "Clifford" and "Carson" were principals in STD.

63. On or about July 24, 1992, D&B transmitted by facsimile and United States mail a fraudulent corporate report pertaining to STD. This report contained false and misleading information about the officers and partners of the company, the size of the company and the financial status of the company.

64. This fraudulent and misleading information was communicated to Plaintiffs by facsimile, telephone and United States mail as well as face to face communications.

65. This fraudulent, misleading and fictitious information was repeatedly communicated to Plaintiffs beginning in 1992 and continuing through the present time.

66. On or about March 30, 1992, Defendant ETMC fictitiously and fraudulently represented itself as the manufacturing corporation which would provide the technology and the facilities for manufacture of aerospace equipment, specifically, the miniaturized lithotripter for use at NASA. A miniaturized lithotripter is a high technology device used commercially to pulverize kidney stones and can be further developed into a multi-tissue ultrasonic

imaging system. ETMC continually made this fictitious and fraudulent representation for the succeeding two (2) years.

67. During the period of October 19, 20, 21, 1992, Defendant, LARRY SEILER, Vice-president of ETMC, flew BROWN to Columbia, Maryland for a tour of ETMC facilities, and intentionally and fraudulently portrayed ETMC as a facility capable of, and involved in, the manufacture of lithotripters. Also participating in these fraudulent misrepresentations were HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON and JOHN DOE BONDED SECURITY GUARD. These defendants, as employees of ETMC, took BROWN on a tour of the ETMC facilities and intentionally and fraudulently portrayed ETMC as a facility capable of, and involved in, the manufacture of lithotripters.

68. Also during this tour in October 1992, Defendant SEILER, on behalf of and as president of ETMC, and "Clifford," posing as vice-president of ETMC, knowingly misrepresented a device to BROWN which was purportedly a prototype of a miniaturized lithotripter when BROWN visited ETMC premises. Also participating in this fraudulent misrepresentation were HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JANE DOE TECHNICAL LIAISON and JOHN DOE BONDED SECURITY GUARD. These Defendants, as employees of ETMC, took BROWN on a tour of ETMC facilities and intentionally and fraudulently misrepresented a device to BROWN which was purportedly a prototype of a miniaturized lithotripter.

69. Also during this tour, ETMC, by and through its employees, agents and representatives, fraudulently held itself out to be an "affiliate" of STD. ETMC also represented to Plaintiffs that STD had

an equity ownership interest in ETMC and ETMC could rely on STD for funds for expansion and development of the miniaturized lithotripter.

70. Plaintiff BROWN relied on this information which he received during these three (3) days in October when negotiating contracts and sales with companies and agencies within the aerospace community. As a result of, and in good faith reliance on this information, BROWN conveyed this information to Plaintiffs HODGSON and SATTERWHITE, who also in good faith relied on the information when making business decisions and service and sales proposals to companies and agencies within the aerospace community and the commercial marketplace.

71. On or about October 26, 1992, SEILER, as president of ETMC, met with BROWN and "Clifford," posing as vice-president of ETMC, in Fort Worth, Texas to discuss the ongoing development of high technology electronics and its associated hardware and materials to fraudulently promote a ten year manufacturing contract to a Texas oil field service company.

72. During the last four months of 1992, ETMC sent correspondence via facsimile and United States mail to BROWN concerning multiple electronics projects.

73. This ongoing and continuing course of conduct was designed to induce Plaintiffs to procure contracts from NASA and the aerospace community for, among other things, the sale and development of a miniaturized lithotripter and other electronic manufacturing devices. These devices and the capability to produce them did not exist. However, in good faith reliance on Defendants' misrepresentations and fraudulent, misleading financial and development information, Plaintiffs proceeded to take actions designed to procure contracts within

the aerospace industry, including pursuing contracts for design of products and services for NASA.

74. On or about January 5, 1993 and continuing through on or about March 10, 1993, SEILER, ETMC, FRANCIS, and STD fraudulently misrepresented to Plaintiffs that they had the capability to produce a device called a Printed Wiring Assembly Robotic Tinning System ("PWARTS"). This device was to be the basis for negotiations for a procurement contract with the Tobyhanna U.S. Army base. This device was also allegedly to be developed and manufactured by ETMC.

75. As a result of and in good faith reliance on Defendants' misrepresentations, Plaintiffs, among other things, had meetings with NASA personnel and personnel from companies within the aerospace community and private industry; obtained information about NASA's procedural requirements for making unsolicited proposals to the agency; were directly involved in preparing and commenting upon written proposals submitted to NASA, aerospace companies, and other private companies on behalf of Horizon, Inc., Space, Inc., TerraSpace Technology, Inc. and TerraSpace, Inc.; and continuously represented to important NASA officials and aerospace companies that ETMC, Space, Inc., Horizon, Inc., TerraSpace Technology, Inc. and TerraSpace, Inc. had the capabilities to develop products and services to meet NASA's needs and standards.

76. Defendant ETMC's fraudulent misrepresentations about products, services and projects which did not exist were deliberately created to further an illegal, unconstitutional investigation conducted by the FBI and other government agencies.

77. Defendants, collectively, committed these fraudulent acts and misrepresentations willingly, voluntarily, without justification or cause and with no

basis to believe Plaintiffs would commit any illegal acts.

78. FRANCIS intentionally and maliciously drained the Plaintiffs' personal and corporate resources for the purpose of placing the Plaintiffs in a position where they would be susceptible to his direction. For many months, Plaintiffs spent most of their corporate and personal capital and human resources on potential projects as FRANCIS directed.

79. For many months, without Plaintiffs' knowledge, FRANCIS attempted to get Plaintiffs to perform activities that were illegal or unethical.

80. From on or about July 9, 1992 through on or about March 10, 1993, FRANCIS made promises to Plaintiffs of future business worth millions of dollars if they would help him get a foothold in the NASA markets. FRANCIS' promises lured Plaintiffs away from their ongoing business activities to invest their time and resources into his non-existent business prospects. Plaintiffs were so convinced by FRANCIS' misrepresentations and the supporting background information provided by other Defendants that Plaintiffs logically focussed the majority of their efforts and resources on his business prospects.

81. On or about September 1992 through March 10, 1993, FRANCIS met several times with Plaintiffs and requested marketing information on how he could gain access to several multi-million dollar NASA contracts that were planned for re-bid. Plaintiffs told FRANCIS that they knew people in the community and worked for him to find publicly available competitive marketing information and help FRANCIS form technical alliances.

82. Plaintiffs introduced FRANCIS and CARROLL to many top-level managers of NASA and local aerospace companies including managers at Rockwell,

Lockheed, IBM, Loral, Boeing, General Electric, McDonnell Douglas, Martin Marietta, and others.

83. Through the efforts of Plaintiffs, Space, Inc. legitimately won several bids, but the work was intentionally awarded to other contractors because of the FBI's involvement.

84. Plaintiffs invested considerable resources working on proposals that they had no chance of being awarded, because of the FBI's involvement.

85. On or about December, 1992 to on or about March 10, 1993, Defendants perpetrated a systematic psychological persuasion process against BROWN by offering BROWN a very substantial career opportunity that changed the direction of BROWN's entire life. FRANCIS methodically sought information about BROWN that could be used to his detriment. He learned of BROWN's greatest desires, dreams, and wishes and then psychologically persuaded BROWN to abandon his plans to develop a commercial space industry by offering him a more attractive job.

86. This job offer from FRANCIS, CARROLL and STD led BROWN to believe that he was to become the construction supervisor, overseeing the construction of a multi-million dollar hotel and dive resort in the Bahamas, called the *Isla Del Oro* or Isle of Gold. BROWN was promised a very large salary as well as excellent fringe benefits including a personal plane.

87. This elaborate ruse led BROWN to split up the partnership of TerraSpace Technology, Inc. and TerraSpace, Inc., thereby placing all Plaintiffs in dire financial jeopardy. This job offer further caused BROWN to make extensive arrangements for leaving the country including putting his house on the market and divesting various accounts.

88. FRANCIS told BROWN that he would also be working as an environmentalist, responsible for

moving, restoring and preserving the natural coral reefs that surrounded the *Isla del Oro*.

89. From over twelve months of phone taps, body wire recordings, audio and video surveillance, and personal contact, FRANCIS knew that BROWN dreamt and talked of scuba diving, construction management, island living, and environmental concerns. FRANCIS went into great detail in his plans for the *Isla del Oro*, to knowingly and intentionally coerce BROWN to do whatever FRANCIS chose to have him do, including dissolve his relationships and partnerships with HODGSON and SATTERWHITE.

90. Specifically, this "job opportunity" which FRANCIS offered to BROWN was part of FRANCIS' plan to gain BROWN'S assistance with the transaction which occurred on March 4, 1993.

91. FRANCIS set his plan in motion on or about February 26, 1993, when FRANCIS informed Neal Jackson that a procurement official from the Tobyhanna army base would be in Houston. FRANCIS instructed Jackson to entertain this officer.

92. On or about March 3, 1993, FRANCIS instructed Jackson to have BROWN assist him.

93. On or about March 4, 1993, FRANCIS told BROWN to make himself available to help Jackson. In this conversation, FRANCIS told BROWN that he should be ready to leave for the *Isla del Oro* by the end of the week.

94. On or about March 4, 1993, FRANCIS informed Jackson that the official did not want to be entertained, but requested that someone go to his hotel room with entertainment funds.

95. On or about March 4, 1993, Jackson and BROWN drive to the Hobby Airport HILTON and, in the parking lot, Jackson hands BROWN a sealed envelope and instructs him to deliver the envelope to a room in the hotel.

96. BROWN enters the HILTON, takes an elevator to the fifth floor, to Room 509. A man answers the door and BROWN hands him a folded newspaper with the sealed envelope inside. BROWN departs immediately.

97. For several days surrounding and including March 4, 1993, HILTON HOTELS CORPORATION knowingly and intentionally violated BROWN'S right to privacy and the right to be free from unwanted and unwarranted intrusion into his private affairs by knowingly and intentionally allowing the FBI to install video cameras, microphone equipment and two way mirrors in its hotel rooms. Additionally, HILTON HOTELS CORPORATION voluntarily agreed and knowingly and intentionally allowed FBI agents to pose as HILTON HOTEL employees.

98. On or about August 4, 1993, BROWN was directed to a clandestine warehouse in Houston, Texas where FBI agents used illegal intimidation and psychological abuse to coerce and blackmail BROWN into going undercover and setting up other stings on other aerospace contractors.

99. Armed agents of the OIG and the FBI subjected BROWN to many hours of intense interrogation. BROWN continually proclaimed his innocence, even as Defendants threatened him with twenty-one crimes, sixty years in prison, and fines over $1,250,000.00. BROWN was subjected to visual intimidation and disorientation, and coercive persuasion, as well as brain-washing techniques. BROWN was confined in this warehouse against his will.

100. On or about August 4, 1993, during the interrogation process, BROWN was held in custody and never read his *Miranda* rights advising him of his constitutional right to remain silent and his right to speak to an attorney. In fact, BROWN was told by Defendants that he could not contact an attorney or he would be arrested and held in jail for up to

thirty days – in isolation, with no phone calls. BROWN repeatedly asked FRANCIS if an attorney was necessary and FRANCIS repeatedly answered in the negative.

101. On or about August 4, 1993, FBI agents subjected BROWN to illegal interrogation methods, psychological and physiological manipulation and illegal confinement at the SHERATON HOTEL-ASTRODOME in Houston, Texas. Continually proclaiming his innocence, BROWN was subjected to both psychological as well as physical abuse by agents of the FBI and DCIS. FRANCIS and agent Lance Booth physically assaulted BROWN in this secret interrogation.

102. On or about August 4, 1993 at the SHERATON HOTEL-ASTRODOME, BROWN, while held in custody, was subjected to intense interrogation, not read his *Miranda* rights advising him of his constitutional right to remain silent and right to speak to an attorney, and confined against his will. Again BROWN was informed that if he attempted to contact an attorney he would be placed in jail for 30 days – in isolation, with no phone calls.

103. On or about August 4, 1993 and for the following three months, Defendants forced BROWN through a blackmail scheme to become an unpaid informant infiltrating the local aerospace community. Defendants threatened BROWN with prosecution of over twenty-one crimes, subjecting him to sixty years in prison and fines totaling more than $1,250,000.00.

104. On or about August 10, 1993, BROWN, against his will and better judgment, went undercover against a local aerospace company. As part of the sting, BROWN was forced to settle a multi-million dollar civil lawsuit he had filed against this company.

105. On or about August 10, 1993, FBI agents WYCKOFF and CHADWICK intimidated and coerced BROWN

to sign a waiver against his will stating that he had not been pressured by the FBI to settle this suit.

106. On or about May 22, 1994, a public statement was made by FRANCIS stating that after two years of intensive investigation, the FBI was directed by national-level government officials to abandon their sting operation. Though very close to clinching cases against NASA managers, FRANCIS claimed the investigation was politically derailed so that the Department of Justice "would not be compelled to prosecute the big fish." To justify what had become a multi-million dollar investigation, the FBI agents sought indictments on many of the individuals they had coerced into being informants, including BROWN.

107. During the three months that BROWN worked undercover against his will, BROWN faced increasing pressure and stress.

108. On or about August 12, 1994, BROWN suffered massive heart failure. Emergency heart surgery was performed on August 18, 1994, with the doctors giving BROWN slim chances for survival from the bacterial endocardis stress-related infection that destroyed his heart.

109. On August 24, 1994 the Grand Jury returned an indictment for one count of offering a $500 bribe to a public official against BROWN.

110. On or about July 1, 1995, the first criminal trial terminated in favor of BROWN in that Plaintiff's trial ended in a mistrial, the U.S. Attorney's Office decided to retry the case, and subsequently set the trial date for a second criminal trial. Plaintiff BROWN was innocent of the charge brought against him.

111. On or about September 1, 1995, the second criminal trial action was terminated in favor of BROWN in that the U.S. Attorney's Office declined to retry the

case and subsequently dismissed the charge against BROWN. BROWN was innocent of the charge brought against him.

112. At the time of the fraudulent conduct and the misrepresentations, Plaintiffs enjoyed a well-respected reputation within NASA and the aerospace community. Plaintiffs were regarded as competent, honest, credible and effective professionals. It was essential to Plaintiffs' livelihood and professional standing to continue to be so regarded.

113. All statements made and actions taken by Defendants were made knowingly and intentionally. Plaintiffs in good faith believed and relied upon these false and fraudulent statements and actions. This reliance was to their detriment and the damage caused to their reputations with NASA and within the aerospace community is irreversible.

114. As a result of the continuous pattern of constitutional violations, tortious conduct, fraudulent conduct and misrepresentations made by Defendants, Plaintiffs have suffered irreparable damage to their professional standing and reputation within the aerospace community and with NASA. As a result of Defendants' misrepresentations, Plaintiffs have also sustained substantial business and personal losses, as well as physical and mental injuries.

115. Plaintiffs are no longer regarded as honest, capable, effective and credible professionals and, therefore, Plaintiffs no longer have the ability to successfully market and sell services to NASA and the aerospace community or the commercial marketplace. These damages were directly foreseeable to Defendants and are the proximate cause of Plaintiffs' damages.

116. BROWN's criminal defense attorney, Dick DeGuerin, stated that Operation Lighting Strike " . . . was the most blatant case of blackmail, entrapment and widespread intimidation by the

federal government (he had seen) in thirty years of practicing law."

117. Plaintiffs' lives were systematically twisted from success to devastation.

CLAIMS FOR RELIEF

Racketeering Influenced and Corrupt Organizations Act

Plaintiffs make the following claims for relief for violations of 18 U.S.C. § 1961 *et seq.*, the Racketeering Influenced and Corrupt Practices Act ("RICO"):

118. NATIONSBANK CORPORATIONS ("NATIONSBANK") is an enterprise engaged in and the activities of which affect interstate commerce, to wit a corporation incorporated under the laws of the State of Delaware.

119. Defendant JODY JONES, as a person within the meaning of 18 U.S.C. § 1961(3), and as a person employed by and associated with said enterprise, conducted and participated, directly and indirectly, in the conduct of the affairs of said enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

120. The five predicate acts which constitute this pattern of racketeering activity are:

a. In the summer of 1992, Defendant JODY JONES schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by intentionally misrepresenting via telephone to BROWN, the financial stability of STD. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

b. In the summer of 1992, Defendant JODY JONES schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by intentionally, falsely and fraudulently representing via telephone to BROWN that a one million dollar line of credit had been issued to "Clifford" and STD. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

c. In the summer of 1992, Defendant, JODY JONES, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by intentionally representing via telephone to BROWN that the line of credit was correct and valid. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

d. In the summer of 1992, Defendant JODY JONES schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by intentionally, falsely and fraudulently representing via telephone to BROWN that "Clifford" and "Carson" had personal and commercial bank accounts with NATIONSBANK. JODY JONES falsely and fraudulently represented via telephone that "Clifford" had personal bank accounts with NATIONSBANK and accounts totaling more than ten (10) million dollars. JODY JONES also falsely and fraudulently represented via telephone that "Carson" had personal bank accounts with NATIONSBANK with accounts totaling more than one hundred twenty (120) million dollars. JODY JONES falsely and fraudulently represented

via telephone that STD, as a corporation, had ten (10) million dollars in commercial bank accounts. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

e. Additionally, in the summer of 1992, Defendant JODY JONES schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services falsely and fraudulently representing that "Clifford" and "Carson" were president and vice-president, respectively, of STD and confirmed the financial information contained in the CONN accounting report. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

121. Defendant ETMC is an enterprise engaged in and the activities of which affect interstate commerce, to wit a corporation incorporated under the laws of the State of Maryland.

122. Defendants SEILER, HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON, and JOHN DOE BONDED SECURITY GUARD as persons within the meaning of 18 U.S.C. § 1961(3), and as persons employed by and associated with said enterprise, conducted and participated, directly and indirectly, in the conduct of the affairs of said enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

123. There are well over one hundred (100) predicate acts which constitute this pattern of racketeering activity, including:

a. During the months of August 1992 through March 1993, Defendant SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

b. During the months of August 1992 through 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

c. During the months of August 1992 through March 1993, Defendant SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

d. During the months of August 1992 through 1993, SEILER schemed to defraud Plaintiffs

by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN false and fraudulent information, detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

e. During the months of August 1992 through March 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army.

f. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346

g. During the months of August 1992 through 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN

fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

h. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

i. During the months of August 1992 through 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN false and fraudulent information, detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

j. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine

detectors and Astro water purification system for use in procuring and developing contracts with the United States Army.

k. During the months of August 1992 through March 1993, HESS, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

l. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services, by communicating to BROWN fraudulent and fictitious information, via telephone and facsimile, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

m. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services, by communicating to BROWN fraudulent and fictitious information, via telephone and facsimile, detailing ETMC's development and capabilities of developing the digital pager

for use in NASA contracts. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

n. During the months of August 1992 through March 1993, HESS, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

o. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services, by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army.

p. During the months of August, 1992 through March 1993, Defendant JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information; detailing ETMC's development and capabilities of developing the miniaturized

lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

q. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

r. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

s. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial

market. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

t. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

u. During the months of August, 1992 through March 1993, Defendant JOHN DOE GENRAD TECHNICIAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

v. During the months of August 1992 through March 1993, JOHN DOE GENRAD TECHNICIAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of

developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

w. During the months of August, 1992 through March 1993, Defendant JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346

x. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

y. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts.

This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

z. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN false and fraudulent information, detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

aa. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone and facsimile to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

bb. During the months of August 1992 through March 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and

capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

cc. During the months of August 1992 through 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

dd. During the months of August 1992 through March 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ee. During the months of August 1992 through 1993, SEILER, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating, via United States mail, to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by U.S. mail

constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ff. During the months of August 1992 through March 1993, SEILER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

gg. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

hh. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract.

This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ii. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346

jj. During the months of August 1992 through March 1993, FRANCIS, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating, via United States mail, to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346

kk. During the months of August 1992 through March 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and

developing contracts with the United States Army. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ll. During the months of August, 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

mm. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by telephone constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

nn. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

oo. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating, via United States mail, to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

pp. During the months of August 1992 through March 1993, HESS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

qq. During the months of August, 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

rr. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ss. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

tt. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating, via United States mail, to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by U.S. mail constitutes wire fraud under 18 U.S.C. §§ 1341 and 1346.

uu. During the months of August 1992 through March 1993, JOHN DOE TECHNICAL MANAGER schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

vv. During the months of August, 1992 through March 1993, JOHN DOE GENRAD TECHNICIAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

ww. During the months of August 1992 through March 1993, JOHN DOE GENRAD TECHNICIAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

xx. During the months of August, 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, via United States mail detailing ETMC's development and capabilities of developing the miniaturized lithotripter. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

yy. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the PWARTS for use in procuring the Tobyhanna contract. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

zz. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the digital pager for use in NASA contracts. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

aaa. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating, via United States mail, to BROWN false and fraudulent information detailing ETMC's development and capabilities to develop infrared sensors for use in the commercial market. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

bbb. During the months of August 1992 through March 1993, JANE DOE TECHNICAL LIAISON schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent and fictitious information, detailing ETMC's development and capabilities of developing the Astro mine detectors and Astro water purification system for use in procuring and developing contracts with the United States Army. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

124. Defendant CONN & COMPANY is an enterprise engaged in and the activities of which affect interstate commerce, to wit a corporation incorporated under the laws of the State of Georgia.

125. Defendants JANE DOE-CONN EMPLOYEE and JOHN DOE-CONN EMPLOYEE, are persons within the meaning of 18 U.S.C. § 1961(3), and as persons employed by and associated with said enterprise, conducted and participated, directly and indirectly, in the conduct of the affairs of said enterprise

through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

126. The four predicate acts which constitute this pattern of racketeering activity are:

a. During the month of July 1992, JANE DOE-CONN EMPLOYEE schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone fraudulent information about STD, confirming financial information contained in a financial report done by CONN. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

b. During the month of July 1992, JANE DOE-CONN EMPLOYEE schemed to defraud Plaintiffs by scheming to deprive them of their right to intangible right to honest services by communicating via telephone the fraudulent information that Conn & Company had been the accounting firm of Defendant STD for over four (4) years. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

c. During the month of July 1992, JANE DOE-CONN EMPLOYEE schemed to defraud the Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone that the fraudulent information contained in the accounting report of STD's finances done by CONN was verified financial information upon which Plaintiffs could rely. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

d. During the month of July 1992, JANE DOE-CONN EMPLOYEE schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone information, confirming the officers and principals of STD. This misrepresentation by telephone constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

127. D&B is an enterprise engaged in and the activities of which affect interstate commerce, to wit a corporation incorporated under the laws of the State of Delaware.

128. Defendants JANE DOE-D&B EMPLOYEE and JOHN DOE-D&B EMPLOYEE, are persons within the meaning of 18 U.S.C. § 1961(3), and as persons employed by and associated with said enterprise, conducted and participated, directly and indirectly, in the conduct of the affairs of said enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

129. The six (6) predicate acts which constitute this pattern of racketeering activity are:

a. In July 1992, Defendants schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services, by communicating via facsimile to BROWN fraudulent, misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation by facsimile constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

b. In July 1992, Defendants schemed to defraud Plaintiffs by scheming to deprive them of

their intangible right to honest services by communicating via the United States mail to BROWN fraudulent, misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

c. On or about June 6, 1995, Defendants, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via facsimile BROWN fraudulent, misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation by facsimile constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

d. On or about June 6, 1995, Defendants, schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail to BROWN fraudulent, misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation by U.S. mail constitutes mail fraud under 18 U.S.C. §§ 1341 and 1348.

e. On or about June 12, 1995, Defendants schemed to deprive Plaintiffs of their intangible right to honest services by communicating via facsimile to BROWN fraudulent,

misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation by facsimile constitutes wire fraud under 18 U.S.C. §§ 1343 and 1346.

f. On or about June 12, 1995, Defendants schemed to deprive Plaintiffs of their intangible right to honest services by communicating via United States mail to BROWN fraudulent, misleading information which misrepresented material facts about STD's financial stability as well as information about its officers, agents and employees. This misrepresentation constitutes mail fraud under 18 U.S.C. §§ 1341 and 1346.

130. Defendant, SOUTHERN TECHNOLOGIES DIVERSIFIED ("STD") is an enterprise engaged in and the activities of which affect Interstate commerce, to wit a corporation incorporate under the laws of the State of Georgia.

131. Defendants FRANCIS, CARROLL, and YETMAN as persons within the meaning of 18 U.S.C. § 1961(3), and as persons employed by and associated with said enterprise, conducted and participated, directly and indirectly, in the, in the conduct of the affairs of said enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

132. There were well over one hundred (100) predicate acts which constitute this pattern of racketeering activity including:

a. During the time period from July 1992 through August 1993 FRANCIS schemed to defraud Plaintiffs by scheming to deprive

them of their intangible right to honest services by communicating via facsimile information concerning the financial strength and net worth of STD. These misrepresentations constitute wire fraud 18 U.S.C. §§ 1343 and 1346.

b. During the time period from July 1992 through August 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone information concerning the financial strength and net worth of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

c. During the time period from July 1992 through August 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail information concerning the financial strength and net worth of STD. These misrepresentations constitute mail fraud under 18 U.S.C. §§ 1341 and 1346.

d. During the time period from July 1992 through August 1993 FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via facsimile information concerning the investment capabilities of STD. These misrepresentations constitute wire fraud 18 U.S.C. §§ 1343 and 1346.

e. During the time period from July 1992 through August 1993 FRANCIS schemed to defraud Plaintiffs by scheming to deprive

them of their intangible right to honest services by communicating via telephone information concerning the investment capabilities of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

f. During the time period from July 1992 through August 1993, FRANCIS schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail information concerning the investment capabilities of STD. These misrepresentations constitute mail fraud under 18 U.S.C. §§ 1341 and 1346.

g. During the time period from July 1992 through August 1993 CARROLL schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone information concerning the financial strength and net worth of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

h. During the time period from July 1992 through August 1993 CARROLL schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone information concerning the investment capabilities of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

i. During the time period from July 1992 through August 1993 Defendant YETMAN schemed to defraud Plaintiffs by scheming to

deprive them of their intangible right to honest services by communicating via facsimile information concerning the financial strength and net worth of STD. These misrepresentations constitute wire fraud 18 U.S.C. §§ 1343 and 1346.

j. During the time period from July 1992 through August 1993, YETMAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via telephone information concerning the financial strength and net worth of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

k. During the time period from July 1992 through August 1993, YETMAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail information concerning the financial strength and net worth of STD. These misrepresentations constitute mail fraud under 18 U.S.C. §§ 1341 and 1346.

l. During the time period from July 1992 through August 1993, YETMAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via facsimile information concerning the investment capabilities of STD. These misrepresentations constitute wire fraud 18 U.S.C. §§ 1343 and 1346.

m. During the time period from July 1992 through August 1993, YETMAN schemed to defraud Plaintiffs by scheming to deprive

them of their intangible right to honest services by communicating via telephone information concerning the investment capabilities of STD. These misrepresentations constitute wire fraud under 18 U.S.C. §§ 1343 and 1346.

n. During the time period from July 1992 through August 1993, YETMAN schemed to defraud Plaintiffs by scheming to deprive them of their intangible right to honest services by communicating via United States mail information concerning the investment capabilities of STD. These misrepresentations constitute mail fraud under 18 U.S.C. §§ 1341 and 1346.

133. These multiple acts of racketeering, occurring within ten years of one another, constitute a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961 (5).

134. Plaintiffs were injured in their business or property by reason of these violations of 18 U.S.C. § 1962(c), in that, as a direct and proximate result of Defendants complained of acts, Plaintiffs suffered damages, including:

a. Loss of business opportunities;

b. Lost contract revenue;

c. Loss of business and professional reputation;

d. Lost wages, benefits and economic opportunities; and

e. Loss of operating capital.

135. By reason of the Defendants' violations of 18 U.S.C. § 1962, Plaintiffs are entitled, pursuant to 18 U.S.C. § 1964(c) to threefold damages sustained, costs of

suit, interest as allowed by law and reasonable attorneys fees in connection therewith and for such other and further relief as Plaintiffs show themselves justly entitled.

Civil Conspiracy

Plaintiffs make the following claims for relief for civil conspiracy based on:

136. The concerted activity of ETMC, SEILER, HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON and JOHN DOE BONDED SECURITY GUARD collaborating to accomplish multiple acts of unlawful, fraudulent activity which proximately caused Plaintiffs' damages.

137. ETMC, SEILER, HESS, JOHN DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON and JOHN DOE BONDED SECURITY GUARD conspired with FBI agents to commit fraud when on or about March 30, 1992, ETMC fraudulently represented itself as the manufacturing corporation which would provide the technology and facilities for the manufacture of aeronautical equipment. On or about October 19, 20, 21, 1992, FRANCIS and SEILER took BROWN on a tour of the ETMC facilities and intentionally and fraudulently portrayed ETMC as a facility capable of, and involved in, the manufacture of lithotripters.

138. The concerted activity of NATIONSBANK AND JODY JONES collaborating to accomplish multiple acts of unlawful, fraudulent activity which proximately caused Plaintiffs' damages.

139. NATIONSBANK AND JODY JONES conspired with FBI agents to commit fraud when on or about April 15, 1992 through on or about July 1992, these Defendants knowingly and intentionally gave fraudulent information to Plaintiffs, supporting the creation of a fraudulent company with fraudulent net worth and gross sales. Plaintiffs relied on this information in good faith when making business decisions.

140. The concerted activity of D&B, JANE DOE-D&B EMPLOYEE and JOHN DOE-D&B EMPLOYEE collaborating to accomplish multiple acts of unlawful, fraudulent activity which proximately caused Plaintiffs' damages.

141. D&B, JANE DOE-D&B EMPLOYEE and JOHN DOE-D&B EMPLOYEE conspired with FBI agents to commit fraud when on or about July 1992, these Defendants knowingly and intentionally gave fraudulent information to Plaintiffs, supporting the creation of a fraudulent company with fraudulent net worth and gross sales. Plaintiffs relied on this information in good faith when making business decisions.

142. The concerted activity of CONN and JANE DOE-CONN EMPLOYEE and JOHN DOE-CONN EMPLOYEE collaborating to accomplish multiple acts of unlawful, fraudulent activity which proximately caused Plaintiffs' damages.

143. CONN and JANE DOE-CONN EMPLOYEE and JOHN DOE-CONN EMPLOYEE conspired with FBI agents to commit fraud when on or about July 1992, these Defendants knowingly and intentionally gave fraudulent information to Plaintiffs, supporting the creation of a fraudulent company with fraudulent net worth and gross sales. Plaintiffs relied on this

information in good faith when making business decisions.

144. The concerted activity of HILTON collaborating to accomplish multiple acts of unlawful, fraudulent activity which proximately caused Plaintiffs' damages.

145. HILTON conspired with FBI agents to commit fraud and invasion of privacy when on or about March 4, 1993, HILTON'S conduct intruded upon BROWN'S private affairs by allowing unidentified third parties to video tape, audio record and personally view Plaintiff's private actions while in the HILTON HOTEL at Hobby Airport. This intrusion was substantial, highly offensive and objectionable.

Intentional Infliction of Emotional Distress

146. Plaintiffs make this claim for Intentional Infliction of Emotional Distress due to Defendants', collective, intentional and outrageous conduct. Defendants intentionally acted with extreme and outrageous conduct which proximately caused Plaintiffs to suffer severe emotional distress.

Fraud and Deceit

147. Plaintiffs make the following claims based on common law fraud and deceit. Defendants, collectively, made false representations to Plaintiffs. At the time the false representations were made, Defendants knew the representations were false and made the representations intending Plaintiffs to rely on these representations. Plaintiffs, acting in ordinary prudence, relied on these representations and were deceived by the representations. Such false representations were the proximate cause of injury to Plaintiffs.

Invasion of Privacy

148. Defendant HILTON HOTELS CORPORATION intentionally, and without warrant, publicized BROWN'S affairs with which the public had no legitimate concern in such a manner that BROWN suffered mental anxiety, shame and humiliation.

149. On or about March 4, 1993, HILTON'S conduct intruded upon BROWN'S private affairs by allowing unidentified third parties to video tape, audio record and personally view Plaintiff's private actions while in the HILTON HOTEL at Hobby Airport. This intrusion was substantial, highly offensive and objectionable.

150. The SHERATON HOTEL-ASTRODOME intentionally, and without warrant, publicized BROWN'S affairs with which the public had no legitimate concern in such a manner that BROWN suffered mental anxiety, shame and humiliation.

151. Prior to August 4, 1993, SHERATON allowed one of its rooms in the SHERATON HOTEL-ASTRODOME to be equipped with a two-way mirror and other surveillance equipment.

152. On or about August 4, 1993, SHERATON'S conduct intruded upon BROWN's private affairs by allowing unidentified third parties to view Plaintiff's private actions in a room in the SHERATON HOTEL-ASTRODOME.

Interference with Economic Advantage and Benefit

153. The unlawful conduct on the part of the Defendants caused Plaintiffs substantial business losses. Such loss of business and profits was proximately caused by Defendants.

154. At the time of Defendants unlawful conduct, Plaintiffs had reasonable expectations of economic advantage and benefit within the aerospace community and commercial marketplace. These expectations of economic advantage and benefit belonged to Plaintiffs by and through their corporations, TerraSpace Technology, Inc. and TerraSpace, Inc. Defendants, knowing of Plaintiffs' expectations of economic advantage and benefit, wrongfully and without justification interfered with Plaintiffs reasonable expectations of economic advantage and benefit. Without the wrongful acts of Defendants, Plaintiffs would have realized the economic advantage and benefit which they had reasonably expected to receive. As a proximate result of Defendants unlawful interference, Plaintiffs have suffered substantial damages.

FEDERAL TORT CLAIMS ACT

Plaintiffs make the following claims for relief for violations of 28 U.S.C. § 2671 *et seq.*, the Federal Tort Claims Act ("FTCA"):

False Imprisonment

155. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS on numerous occasions directly restrained the physical liberty of Plaintiffs BROWN, SATTERWHITE, and HODGSON without legal justification. The acts which constitute this violation are:

156. On or about August 4, 1993, BROWN was directed to a secret warehouse and subjected to illegal, intense interrogation, intimidation, and coercive

persuasion techniques designed to coerce him into participating in the undercover investigation.

a. Plaintiff BROWN was willfully and forcibly detained by FBI agents, FRANCIS, James Cavannah, WYCKOFF, CHADWICK, Frank Eldridge, Demetri Howard, John Psimas, Jeff Tarpinian, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least four (4) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN did not receive notice of his right to an attorney or his right to remain silent as required by *Miranda v. Arizona*. 384 U.S. 436 (1966). BROWN was intimidated by the physical set-up of the warehouse, which included blown up photographs, TerraSpace company organization charts (among other blowups), filing cabinets with TerraSpace labels, and a list of crimes and fines that would be brought against Plaintiff listed on a chalkboard.

c. After approximately four (4) hours of questioning and accusations, during which time FBI agents Frank Eldridge, Demetri Howard, John Psimas, Jeff Tarpinian were continually passing through the room in which Plaintiff was confined, FBI agents FRANCIS, WYCKOFF, CHADWICK, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth all informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout period of custody described above, Plaintiff felt frightened and suffered severe

mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

157. On or about August 4, 1993, BROWN was escorted by an armed guard to the SHERATON HOTEL-ASTRODOME to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agents FRANCIS, CHADWICK, Frank Eldridge, and other FBI agents, OIG agent Lance Gil Carrington, and by DCIS agent Lance Booth without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning. Plaintiff BROWN was intimidated by the physical set-up of this interrogation center.

c. After approximately two (2) hours of questioning and accusations, during which time other FBI agents were passing through the room in which Plaintiff was confined, FBI agents FRANCIS, CHADWICK, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

158. On or about August 8, 1993, BROWN was directed to the Nassau Bay HILTON HOTEL and escorted by an armed guard to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. Plaintiff BROWN was willfully and forcibly detained by FBI agents FRANCIS, CHADWICK, Frank Eldridge, and other FBI agents, OIG agent Lance Gil Carrington, and by DCIS agent Lance Booth without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning. BROWN was intimidated by the physical set-up of this interrogation center.

c. After approximately two (2) hours of questioning and accusations, during which time FBI agents Frank Eldridge were present in the room in which Plaintiff was confined, FBI agents FRANCIS, CHADWICK, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

159. On or about August 10, 1993, BROWN was directed to the lobby of the law firm of Boyer, Ewing & Fabio at Greenway Plaza in Houston, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agents WYCKOFF and CHADWICK, without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least one (1) hour in spite of Plaintiff's continued protestations of innocence, and demands to speak to his attorney. BROWN received no *Miranda* warning.

c. After approximately one (1) hour of questioning and accusations FBI agents WYCKOFF and CHADWICK informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

160. On or about August 20, 1993, BROWN was directed to the NASA Annex at South Shore Harbour, escorted by an armed guard to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agent WYCKOFF, and OIG agent Lance Gil Carrington, without lawful authority and without his consent.

b. These agents questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to his attorney. BROWN received no *Miranda* warning. BROWN was intimidated by the physical set-up of this interrogation center.

c. After approximately two (2) hours of questioning and accusations, FBI agent WYCKOFF and OIG agent Lance Gil Carrington informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

161. On or about August 30, 1993 BROWN, was directed to the NASA Annex at South Shore Harbour,

escorted by an armed guard to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agent WYCKOFF and OIG agent Lance Gil Carrington without lawful authority and without his consent.

b. These agents questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning. BROWN was intimidated by the physical set-up of this interrogation center.

c. After approximately two (2) hours of questioning and accusations, FBI agent WYCKOFF and OIG agent Lance Gil Carrington informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

162. On or about September 10, 1993, BROWN was directed to the TerraSpace conference room and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agent, WYCKOFF, and OIG agent Lance Gil Carrington, without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning.

c. After approximately two (2) hours of questioning and accusations, FBI agent WYCKOFF and OIG agent Lance Gil Carrington informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

163. On or about September 20, 1993, BROWN was directed to the Chili's restaurant on the Gulf Freeway in Houston, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agents WYCKOFF and FRANCIS and OIG agent Lance Gil Carrington, without lawful authority and without his consent.

b. Defendants questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no Miranda warning.

c. After approximately two (2) hours of questioning and accusations, FBI agents WYCKOFF and Francis and OIG agent Lance Gil Carrington informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the ordeal described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

164. On or about August 20, 1993, Plaintiff SATTERWHITE was directed to the NASA Annex at South Shore Harbour in League City, Texas, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. SATTERWHITE was willfully and forcibly detained by FBI agents FRANCIS, WYCKOFF, CHADWICK, and Frank Eldridge, and OIG agent Lance Gil Carrington, without lawful authority and without his consent.

b. These agents questioned SATTERWHITE for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, requests to be released, and requests to

speak to an attorney. SATTERWHITE received no *Miranda* warning.

c. After approximately two (2) hours of questioning and accusations, FBI agents FRANCIS, WYCKOFF, CHADWICK, and Frank Eldridge, and OIG agent Lance Gil Carrington informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the time in custody described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him medical problems, which continue to this day.

165. As a proximate result of the foregoing acts of Defendant the UNITED STATES OF AMERICA through its agents the FBI, OIG, and DCIS, Plaintiffs suffered injury to their feelings, emotional well being, reputations, health, and character; were generally impaired in their social and mercantile standing; suffered great embarrassment, humiliation, and extreme mental anguish; and were, and are continuously, financially stressed due to lost assets and lost earnings.

Abuse of Process

166. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS maliciously misused the criminal process in an illegal and improper manner not lawfully warranted.

167. The acts which constitute the violation are:

a. On or about August 24, 1994, the FBI, DCIS, and OIG provided false and misleading statements to the United States Attorney's Office and caused a criminal complaint to be issued charging BROWN with one count of offering a bribe to a public official under 18 U.S.C. § 201(b)(1)(A) and (C).

b. At the time Defendants initiated the indictment, Defendants well knew that the charge was falsely made.

c. Defendants procured the arrest of Plaintiff for the purpose of protecting Defendants' career and reputation at the termination of a failed, expensive, unjust, and unsuccessful undercover investigation.

168. On or about August 1, 1992, FRANCIS interfered with and prevented the due process of, and obstructed justice in Plaintiff's attempt to furnish incriminating evidence in a Whistleblower Act action.

169. On or about August 10, 1993, and continuing through December 10, 1993, NASA OIG agents Doug Smith, Lance Gil Carrington, Preston Smith, interfered with and prevented the due process of, and obstructed justice in Plaintiff's attempts to claim justified reward for furnishing all of the key incriminating evidence in a Whistleblower Act action that resulted in NASA realizing a cost avoidance of $7,605,359.40.

170. As a proximate result of the foregoing acts of Defendant, Plaintiffs suffered injury to their feelings, emotional well being, reputations, health, and character; were generally impaired in their social

and mercantile standing; suffered great embarrassment, humiliation, and extreme mental anguish, and were, and are continuously, financially stressed due to lost assets and lost earnings.

Malicious Prosecution

171. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS maliciously instigated criminal charges against BROWN without probable cause.

172. The acts which constitute this violation are:

a. On or about August 24, 1994, the FBI, OIG and DCIS gave the United States Attorney's Office, an untrue and incomplete statement of facts concerning BROWN, thereby causing him to be charged with one count of offering a bribe to a public official under 18 U.S.C. § 201(b)(1)(A) & (C). This indictment was returned in open court in the United States District Court for the Southern District of Texas on August 24, 1994, filed in the records, and docketed as Cause No. H-94-199. Plaintiff was arrested on or about September 10, 1994, pursuant to the warrant issued because of the indictment and was detained in custody for a period of time before being released on a recognizance bond of $25,000.

b. On or about July 1, 1995, the first criminal trial terminated in favor of BROWN in that Plaintiff's trial ended in a mistrial, the U.S. Attorney's Office decided to retry the case, and subsequently set the trial date for a second criminal trial. BROWN was innocent of the charge brought against him.

c. On or about September 1, 1995, the second criminal trial action was terminated in favor of BROWN in that the U.S. Attorney's Office declined to retry the case and subsequently dismissed the charge against BROWN. BROWN was innocent of the charge brought against him.

d. Defendants acted without probable cause in making the statement to the Prosecuting Attorney in that they did not honestly, reasonably, and in good faith believe BROWN to be guilty of the crime charged. Defendants acted maliciously in making a false and incomplete statement to the Prosecuting Attorney.

173. Defendants acted illegally by conspiring and executing a sting without probable cause to target these innocent victims. Defendants actions were beyond the legal guidelines of the Department of Justice Attorney General Guidelines for Undercover Activities. Defendants acted maliciously in instigating the criminal prosecution or making a (false or incomplete) statement to the Prosecuting Attorney.

174. As a proximate result of the criminal prosecution, Plaintiffs suffered injury to their feelings, emotional well being, reputations, health, and character; were generally impaired in their social and mercantile standing; and suffered great embarrassment, humiliation, and mental anguish and suffering, and were, and are continuously, financially stressed.

175. As a further proximate result of the criminal prosecution initiated by Defendants, Plaintiffs incurred the cost of attorney's fees and expenses for the defense against the prosecution.

Assault

176. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS conducted and participated in an illegal interrogation of BROWN, which caused physical injury to Plaintiff.

177. The acts which constitute this violation are:

a. On or about August 4, 1993, BROWN was directed to a secret warehouse and subjected to an illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

b. BROWN was willfully and forcibly detained by FBI agents FRANCIS, James Cavannah, WYCKOFF, CHADWICK, Frank Eldridge, Demetri Howard, John Psimas, Jeff Tarpinian, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth without lawful authority and without his consent.

c. Defendants questioned BROWN for a period of at least four (4) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning. BROWN was intimidated by the physical set-up of the warehouse, which included blown up photographs, TerraSpace company organization charts (among other blowups), filing cabinets with TerraSpace labels, and, on a chalkboard, a list of crimes and fines to which Plaintiff would be subjected.

d. After approximately four (4) hours of questioning and accusations, during which time FBI agents James Cavannah, Frank Eldridge,

Demetri Howard, John Psimas, and Jeff Tarpinian were continually passing through the room in which Plaintiff was confined, FBI agents FRANCIS, WYCKOFF, CHADWICK, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

e. Throughout the ordeal described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

178. On or about August 4, 1993, BROWN was escorted by an armed guard to the SHERATON HOTEL-ASTRODOME to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation.

a. BROWN was willfully and forcibly detained by FBI agents FRANCIS, CHADWICK, Frank Eldridge, and other FBI agents, OIG agent Lance Gil Carrington, and by DCIS agent Lance Booth without lawful authority and without his consent.

b. These agents questioned BROWN for a period of at least two (2) hours in spite of Plaintiff's continued protestations of innocence, demands to be released, and demands to speak to an attorney. BROWN received no *Miranda* warning. BROWN was intimidated by the physical set-up of this interrogation center.

c. After approximately two (2) hours of questioning and accusations, during which time other FBI agents were continually passing through the room in which Plaintiff was confined, FBI agents FRANCIS, CHADWICK, OIG agent Lance Gil Carrington, and DCIS agent Lance Booth informed Plaintiff that if he did not cooperate he would be subject to imprisonment and personal and professional ruin.

d. Throughout the ordeal described above, Plaintiff felt frightened and suffered severe mental anguish. His anxiety over the matter continued after his release and caused him serious medical problems, which resulted in heart and intestinal surgery. These medical problems continue to this day.

179. On or about August 4, 1993, at approximately 5:00 p.m. at the SHERATON HOTEL-ASTRODOME, DCIS agent Lance Booth and FBI agent FRANCIS intentionally or recklessly caused bodily injury to Plaintiff by subjecting him to physical abuse during intense interrogation for a period of two (2) hours.

180. As a direct and proximate result of Defendants' conduct as alleged in this complaint, BROWN sustained bodily injuries, requiring open heart surgery and intestinal surgery requiring extensive medical care and attention. Therefore, Plaintiff has incurred reasonable expenses for necessary medical treatment by physicians, nurses, and hospitals, and for medical supplies, appliances, and medicine. BROWN's physical health deteriorated from the stress and pressure put upon him by Defendants, resulting in heart failure on August 18, 1994, and intestinal failure, later in November, 1994.

Intentional Infliction of Emotional Distress

181. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS conducted and participated in an ongoing pattern of activity intended to lure Plaintiffs into a professional and personal position of extreme distress in order to coerce their assistance in the undercover operation.

182. The acts which constitute the basis of this claim are:

a. During the summer of 1992, Defendants began to place BROWN in legal business situations and intentionally or recklessly tape and photograph BROWN in order to twist this innocent information about BROWN into a crime at the appropriate moment.

b. Defendants forced BROWN to become financially dependent on Defendants by providing a $5000 per month salary through STD. This activity continued until August 1993.

c. During and subsequent to the Fall of 1992, Defendants caused Plaintiffs to become financially dependent upon Defendants by redirecting Plaintiffs' professional activities into areas known by Defendants to devoid of valid economic potential.

d. On or about August 4, 1993, Defendants directed BROWN to a secret interrogation location at a warehouse where Defendants threatened BROWN with felony arrests resulting in long periods of incarceration and staggering fines.

e. Defendants were armed and subjected BROWN to four (4) hours of interrogation at the FBI

warehouse against a backdrop of life-size photographs depicting legal situations twisted to appear illegal.

183. Defendants intentionally inflicted emotional distress on BROWN by coercing him to participate in an entrapment scheme against Larry Stevenson of Astro International, SATTERWHITE, Astronaut David Wolf, and Eagle Engineering.

184. Defendants knew that such behavior would subject BROWN to severe emotional distress because the Defendants well knew that BROWN, HODGSON, and SATTERWHITE had tied up all of their capital in two entrepreneurial technology companies, TerraSpace, Inc. and TerraSpace Technology, Inc. Defendants knew BROWN had just purchased a new home and was having financial trouble. Defendants knew that Plaintiffs valued their professional and personal reputations.

185. From about October 1992 to March 1993, the FBI fraudulently created financial hardship and damage to Plaintiffs.

186. The Defendants' conduct was extreme and outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious and utterly intolerable in a civilized community. In particular, the Defendant's conduct was outrageous because of the misuse of public funds in activities such as frequent visits to expensive strip clubs, the Presidential Suite at the HILTON HOTEL overlooking Clear Lake, Texas, meals at expensive restaurants, as well as detailed promises of a long-term job at *Isla Del Oro* (the FBI's fictional Isle of Gold). Also, the Defendant's caused Plaintiffs to invest large amounts of time and money to bid on projects some of which had no possibility of being won and others that were

maliciously and intentionally destroyed after being won by Plaintiffs. Defendants entered into contractual agreements with Plaintiffs and did not fulfill their contractual obligations.

187. The Defendant's conduct proximately caused Plaintiffs damage in that it caused Plaintiffs to suffer severe emotional distress. In particular, the Defendants' conduct was the direct and proximate cause of severe disappointment, indignation, wounded pride, shame, despair, and public humiliation.

188. Plaintiffs' emotional distress has been severe in that BROWN suffered stress related heart and internal organ problems and underwent both open-heart surgery and intestinal surgery. SATTERWHITE suffered psoriasis and other stress related physical disorders.

Invasion of Privacy

189. Defendant UNITED STATES OF AMERICA, through its agents the FBI, OIG, and DCIS conducted and participated in an ongoing pattern of illegal and unjustified activity designed to gather information about Plaintiffs, thereby violating their right to privacy.

190. The acts which constitute the basis of this claim are:

a. On or about November 1, 1992, Defendants willfully and without Plaintiffs' knowledge or consent, installed an electronic listening device at or to record Plaintiff SATTERWHITE'S private residence located at 109 Shirleen, Seabrook, Harris County, Texas, in an attempt to intercept and record Plaintiffs' private telephone conversations and to cruelly deprive

Plaintiff of his right to be free from wrongful intrusion into his private affairs.

b. On or about March 1, 1993, Defendants willfully and without Plaintiffs knowledge or consent, installed an electronic listening device at or to record BROWN's private residence located at 2103 Broadmoor Court, League City, Galveston County, Texas, in an attempt to intercept and record Plaintiff's private telephone conversations and to cruelly deprive Plaintiff of his right to be free from wrongful intrusion into his private affairs.

c. On or about August 18, 1992 through March 16, 1993, Defendants willfully and without Plaintiffs' knowledge or consent, surveilled Plaintiffs at least seventeen (17) times at various locations throughout Galveston and Harris County, Texas, Baltimore and Columbia, Maryland, in an effort to follow and video tape Plaintiffs' actions and to cruelly deprive Plaintiffs of their rights to be free from wrongful intrusion into their private affairs.

d. On or about August 18, 1992 through March 16, 1993, Defendants willfully and without Plaintiffs knowledge or consent, surveilled BROWN at least 14 times at various locations throughout Galveston and Harris County, Texas, Baltimore and Columbia, Maryland, in an effort to follow and video tape Plaintiff's actions and to cruelly deprive Plaintiff of his right to be free from wrongful intrusion into his private affairs.

191. As a direct and proximate result of Defendants' unjustified and unlawful invasion of Plaintiffs' privacy, Plaintiffs suffered a loss of privacy as well as severe humiliation, embarrassment, fear, frustration and general intense mental anguish, and in all

reasonable likelihood they will continue to do so for a long time into the future and for the balance of their natural lives.

CONSTITUTIONAL VIOLATIONS

Pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs make the following claims of constitutional violations by FBI agents FRANCIS, CARROLL, YETMAN, WYCKOFF and CHADWICK:

Due Process Deprivations

192. As a result of the Defendants' actions which form the basis of this suit, Plaintiffs were deprived of their liberty and property without due process of law.

193. This constitutional guarantee of due process is clearly established in American jurisprudence. Defendants were aware of the law at the time of their continuous pattern of illegal conduct and intentionally set out to methodically deprive Plaintiffs of their liberty and their property.

194. During and subsequent to the Fall of 1992, the Defendants FRANCIS, CARROLL, and YETMAN wilfully and directly caused Plaintiffs to invest time, money and resources into numerous fraudulent business projects known by Defendants to be devoid of realistic economic potential or unreliable due to illegitimate participation by the FBI front company, Defendant STD.

a. These contracts include, but are not limited to:

i. MSSS 9/1/92

ii. Attitude Adjuster 10/1/92

iii. CSSS 1/93

iv. ECP 1/93

v. Envir. R&D 1/93

vi. Envir.Services 1/93

vii. SeaGuide 02/01/93

viii. ETAC 02/01/93

ix. Loral T&M contract 10/01/92

x. Posse 12/01/92

xi. IBM-IFFSC 09/01/92

195. The continuous and ongoing conduct of Defendants in causing them to lose contracts awarded to them constitute an unconstitutional deprivation of Plaintiffs' clearly established constitutional right to freely contract.

196. The deprivations of time, money and resources that Plaintiffs' spent working on proposals to win business further constitute an unconstitutional deprivation of property without due process of law because such "opportunities" were either non-existent to begin with or lost due to the actions of FRANCIS, CARROLL, and YETMAN.

197. Plaintiffs were further unconstitutionally deprived of their right to bring a cause of action.

a. On or about August 10, 1993, BROWN, coerced by FRANCIS and CARROLL, went undercover against a local aerospace company. As part of

this sting, BROWN was forced by Defendants to settle a multi-million dollar civil lawsuit he had filed against this company.

b. On or about August 10, 1993, FBI agents WYCKOFF and CHADWICK intimidated and coerced BROWN to sign a waiver against his will stating that he had *not* been pressured by the FBI to settle this suit.

198. These actions unconstitutionally deprived Plaintiffs of their clearly established right to bring a cause of action.

Fifth Amendment Violations

199. From on or about August 4, 1993 to on or about February 24, 1994, Plaintiffs were deprived of their Fifth Amendment right to remain silent and their right to consult with an attorney.

200. These constitutional guarantees against an over-zealous government are clearly established in American jurisprudence. Defendants were aware of the law at the time of their pattern of illegal conduct requiring that under the U.S. Constitution, individuals subject to custodial interrogation must be advised of their constitutional rights to remain silent and to consult with an attorney.

201. The actions which form the basis of this cause of action are as follows:

a. On or about August 4, 1993, BROWN was directed to a clandestine warehouse in Houston, Texas where FBI agents held BROWN in custody and never read him his *Miranda* rights advising him of his constitutional right to remain silent and his right to speak to an

attorney. In fact, BROWN was told by Defendants that he could not contact an attorney or he would be arrested and held in jail for up to thirty days – in isolation, with no phone calls. BROWN repeatedly asked FRANCIS if an attorney was necessary and FRANCIS repeatedly answered in the negative.

b. On or about August 10, 1993, BROWN was directed to the law firm of Boyer, Ewing & Fabio at Greenway Plaza in Houston, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. BROWN was not advised of his right to remain silent or his right to speak with an attorney.

c. On or about August 20, 1993, BROWN was directed to the NASA Annex at South Shore Harbour, escorted by an armed guard to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. BROWN was not advised of his right to remain silent or his right to speak with an attorney.

d. On or about August 30, 1993 BROWN, was directed to the NASA Annex at South Shore Harbour, escorted by an armed guard to a secret interrogation center and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. BROWN was not advised of his

right to remain silent or his right to speak with an attorney.

e. On or about September 10, 1993, BROWN was directed to the TerraSpace conference room and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. BROWN was not advised of his right to remain silent or his right to speak with an attorney.

f. On or about September 20, 1993, BROWN was directed to the Chili's restaurant on the Gulf Freeway in Houston, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. BROWN was not advised of his right to remain silent or his right to speak with an attorney.

g. On or about August 20, 1993, SATTERWHITE was directed to the NASA Annex at South Shore Harbour in League City, Texas, escorted by an armed guard and subjected to illegal, intense interrogation, intimidation, and coercive persuasion techniques designed to coerce him into participating in the undercover investigation. SATTERWHITE was not advised of his right to remain silent or his right to speak with an attorney.

DAMAGES

202. In addition to the damages previously set forth and claimed due to violations of 18 U.S.C. § 1962(c), the RICO statute, and 28 U.S.C. § 2671, the Federal Tort

Claims Act, Plaintiffs also seek the following damages as a proximate result of the conduct described herein:

203. Plaintiff, DALE BROWN, sustained injuries and as a result of his injuries he should be compensated for each and all of the following elements of damage, both in the past and those which in reasonable probability he will sustain into the future:

a. Physical pain and mental anguish;

b. Emotional distress;

c. Shame and embarrassment;

d. Humiliation;

e. Lost business and professional reputation;

f. Lost wages, benefits, profits and economic opportunities;

g. Medical expenses;

h. Lost personal financial resources; and

i. Unnecessary legal fees for criminal defense.

204. Plaintiff, R. SCOTT SATTERWHITE sustained injuries and damages for which he should be compensated for each and all of the following elements of damage, both in the past and those which in reasonable probability he will sustain into the future:

a. Physical pain and mental anguish;

b. Emotional distress;

c. Shame and embarrassment;

d. Humiliation;

e. Lost business and professional reputation;

f. Lost wages, benefits, profits and economic opportunities;

g. Medical expenses; and

h. Loss of personal financial resources.

205. Plaintiff, ANTHONY HODGSON sustained injuries and damages for which he should be compensated for each and all of the following elements of damage, both in the past and those which in reasonable probability he will sustain into the future:

a. Mental anguish;

b. Emotional distress;

c. Shame and embarrassment;

d. Humiliation;

e. Lost business and professional reputation;

f. Lost wages, benefits, profits and economic opportunities; and

g. Loss of personal financial resources.

206. Plaintiffs sue for $49,800,000.00.

207. Plaintiffs seek pre-judgment and post-judgment interest as allowed by law.

CONCLUSION

208. WHEREFORE, Plaintiffs pray the Defendants be cited to appear and answer herein and that, upon final hearing, Plaintiffs have judgment against these Defendants, UNITED STATES OF AMERICA, NATIONSBANK CORPORATION, JODY JONES, EASTERN TECH MANUFACTURING CORPORATION, LARRY SEILER, CHARLES E. HESS, JOHN

DOE TECHNICAL MANAGER, JOHN DOE GENRAD TECHNICIAN, JOHN DOE PLANT MANAGER, JANE DOE TECHNICAL LIAISON, JOHN DOE BONDED SECURITY GUARD, CONN & COMPANY, JANE DOE-CONN & COMPANY EMPLOYEE, JOHN DOE-CONN & COMPANY EMPLOYEE, DUN & BRADSTREET, JANE DOE-DUN & BRADSTREET EMPLOYEE, JOHN DOE-DUN & BRADSTREET EMPLOYEE, SOUTHERN TECHNOLOGIES DIVERSIFIED, L.P., JAMES H. FRANCIS, JOSEPH E. CARROLL, JEAN BARRETT YETMAN, MICHELLE WYCKOFF, SHEILA CHADWICK, HILTON HOTELS CORPORATION, and LEISURE HOSPITALITY MANAGEMENT COMPANY d/b/a SHERATON HOTEL-ASTRODOME, jointly and severally for their damages as described above, and each of them, as follows:

a. Actual and special damages as alleged herein;

b. Threefold damages actually sustained, the costs of suit and reasonable attorneys fees, pursuant to 18 U.S.C. § 1964(c) with interest as allowed by law;

c. Costs of suit and pre-judgment and post-judgment interest as allowed by law; and

d. For such other and further relief, general and specific, in law and in equity, to which they are entitled.

Respectfully submitted,

ABRAHAM, WATKINS,
NICHOLS BALLARD &
FRIEND

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No. 99-1416

In the Supreme Court of the United States

DALE A. BROWN, R. SCOTT SATTERWHITE, AND ANTHONY P. HODGSON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18PP

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed petitioners' claims brought pursuant to the Federal Tort Claims Act and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on the ground that the claims were time-barred.

2. Whether the court of appeals properly applied Texas' two-year statute of limitations applicable to personal injury claims to petitioners' claims brought pursuant to *Bivens*.

3. Whether the court of appeals correctly dismissed petitioners' claims against respondent federal agents on the ground that respondents were entitled to qualified immunity, without affording petitioners discovery on that issue.

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In the Supreme Court of the United States

No. 99-1416

DALE A. BROWN, R. SCOTT SATTERWHITE, AND ANTHONY P. HODGSON, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 188 F.3d 579. The opinion of the district court (Pet. App. 25-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1999. A petition for rehearing was denied on November 12, 1999 (Pet. App. 37-38). On February 10, 2000, the time to file a petition for a writ of certiorari was extended to February 24, 2000. The petition for a writ of certiorari was filed on February 24, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the fall of 1991, the Federal Bureau of Investigation (FBI) initiated an undercover investigation, code-named "Operation Lightning Strike," designed to uncover procurement-related fraud and other illegal activity committed by National Aeronautic and Space Administration (NASA) employees and aerospace contractors doing business with NASA. Pet. App. 48. NASA's Office of the Inspector General and the Defense Contractor Investigative Service (DCIS) also participated in the investigation. *Id.* at 49.

a. In May 1992, FBI Special Agent James H. Francis, posing as an investor named "John Clifford," contacted petitioners Brown, Satterwhite, and Hodgson. Pet. App. 50. Petitioners were not targets of the investigation. *Ibid.* However, petitioners operated two companies that provided aerospace-related products and services to private and governmental entities, *id.* at 48, and petitioners were used by the FBI to meet potential targets within the NASA community, *id.* at 50.

Francis claimed to be a wealthy businessman seeking to market "cutting-edge" electronics to NASA and the aerospace industry. Pet. App. 49-50. He told petitioners that he planned to develop a miniature medical device—a "lithotripter"—that could help astronauts survive in space. *Id.* at 50, 53. Francis proposed that petitioners' Houston, Texas, aerospace firm form a partnership with Eastern Tech Manufacturing Corporation (ETMC), in order to gain valuable contracts with NASA and its contractors. *Id.* at 50. Francis posed as vice-president of ETMC, which was a legitimate company. *Id.* at 54. Francis also offered Brown a high-level executive position at "Space,

Inc," a front company created by the FBI, and promised to commit venture capital to petitioners' companies. *Id.* at 50-51. Petitioners agreed that it would be profitable to establish a business relationship with Francis. *Id.* at 51.

In May and July 1992, petitioners contacted various banks and companies in order to verify Francis' financial information. Pet. App. 51-53. Representatives of those institutions, cooperating with the FBI, provided petitioners with favorable, false information regarding the financial status of the fictitious "John Clifford." *Ibid.* In addition, representatives of ETMC falsely represented the company as a facility capable of and involved in the manufacture of lithotripters, and a device called a Printed Wiring Assembly Robotic Tinning System (PWARTS). *Id.* at 54, 56. Petitioners understood that the PWARTS was a possible basis for a procurement contract with the Tobyhanna United States Army base. *Id.* at 56. In reliance on these misrepresentations, petitioners met with personnel from NASA, as well as companies within the aerospace community and the private industry, and submitted proposals to those entities representing that ETMC and Space, Inc., as well as petitioners' own companies, could develop products and services meeting NASA's standards. *Ibid.*

From December 1992 to March 1993, Francis sought to persuade Brown to abandon his career plans in the commercial space industry. Pet. App. 58. He offered Brown a job as a construction supervisor, responsible for the building of a Bahamas hotel, with a large salary and attractive fringe benefits, including a private plane. *Ibid.* In anticipation of this new position, Brown dissolved his business relationship with petitioners Hodgson and Satterwhite. *Id.* at 59.

On February 26, 1993, Francis instructed Brown's business associate, Neal Jackson, to "entertain," with Brown's assistance, a procurement official from the Army's Tobyhanna base who would be visiting Houston. Pet. App. 59. On March 4, 1993, Francis told Jackson that the official did not wish to be entertained, but requested that "entertainment funds" be brought to his hotel. *Ibid.* Brown and Jackson drove to the official's hotel in Houston, where Jackson handed Brown a sealed envelope, and told Brown to deliver it to the official's room. Brown did so, and immediately departed. *Id.* at 59-60. Audio and visual recording equipment had been installed in the hotel rooms by the FBI. *Id.* at 60.

b. On August 4, 1993, FBI agents confronted Brown in a warehouse in Houston, Pet. App. 60, where they informed him of the existence of the undercover investigation, that Clifford was an FBI agent, and that the projects and job offers Clifford had described did not actually exist. Pet. 8. According to the Complaint, the agents intimidated, psychologically abused, and blackmailed Brown, in order to coerce him into "going undercover and setting up other stings on other aerospace contractors." Pet. App. 60. The agents, *inter alia*, threatened to prosecute Brown for various crimes. *Ibid.* Brown agreed to cooperate.[1]

On May 22, 1994, Francis disclosed publicly that the FBI had been directed to abandon the undercover investigation. Pet. App. 62. On August 24, 1994, a

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[1] The Complaint alleges that as part of his cooperation, Brown was forced to settle a pending lawsuit against a company that he agreed to investigate, and then was coerced to sign a waiver stating that the FBI had not pressured him to settle. Pet. App. 61-62.

federal grand jury indicted Brown for one count of offering a $500 bribe to a public official. *Ibid.* Brown's trial ended in a mistrial, and the United States Attorney declined to retry him. *Id.* at 62-63.

2. On February 22, 1996, petitioners sued the United States, and the federal agents who participated in the undercover investigation, in their individual capacities, in the United States District Court for the Southern District of Texas.[2] Pet. App. 2. Petitioners brought claims against the United States pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) (1994 & Supp. IV 1998), 2401(b), 2671-2680, alleging false imprisonment, abuse of process, malicious prosecution, assault, intentional infliction of emotional distress, and invasion of privacy. Pet. App. 32. Petitioners also brought claims against the federal agents alleging, *inter alia*, violations of their due process and Fifth Amendment rights pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*[3] Pet. App. 28, 34.

On July 30, 1997, the district court dismissed petitioners' claims against the United States alleging malicious prosecution and abuse of process, brought pursuant to the FTCA, on the ground that the claims were barred by the FTCA's "discretionary function"

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[2] Petitioners also sued the private businesses who assisted in the investigation. Pet. App. 2. The district court dismissed the claims against those parties and the court of appeals affirmed. *Id.* at 12, 16-18. Those determinations are not at issue here.

[3] Petitioners also brought a number of state tort law claims against respondents. Pet. App. 15. The district court dismissed those claims; the court of appeals affirmed, *id.* at 30-32, 15-16, and that determination is not at issue here.

exception. Pet. App. 34; 28 U.S.C. 2680(a). The district court dismissed petitioners' other claims brought pursuant to the FTCA, as well as petitioners' *Bivens* claims against the individual FBI agents, on the ground that the claims were time-barred. Pet. App. 32-34. The district court also dismissed petitioners' RICO claims against the agents on the ground that the agents were protected by qualified immunity. *Id.* at 29, 31.

3. Petitioners appealed, and the court of appeals affirmed. Pet. App. 1-24. The court of appeals affirmed the dismissal of petitioners' allegations of malicious prosecution and abuse of process, not on discretionary function grounds, but on the ground that petitioners failed to state a claim upon which relief could be granted. *Id.* at 10-12. The court affirmed the dismissal of petitioners' other claims against the United States brought pursuant to the FTCA alleging assault, false imprisonment, intentional infliction of emotional distress, and invasion of privacy, on the ground that the claims were time-barred. The claims involved events that took place in August and September 1993 and had not been presented to the appropriate administrative agencies within two years of their occurrence, as required by 28 U.S.C. 2401(b). Pet. App. 18-19.

The court of appeals affirmed the dismissal as time-barred of two of petitioners' claims against the respondent federal agents pursuant to *Bivens*. The court of appeals applied the two-year statute of limitations applicable to personal injury claims under Texas law, and concluded that Brown's and Satterwhite's claims accrued in August 1993, when they learned of the government's sting operation, and therefore their claims were barred by the statute of limitations. Pet. App. 19. The court could not ascertain from the record when petitioner Hodgson's *Bivens* claims

accrued, but affirmed the dismissal of his claims on the alternative ground that he did not allege a violation of "clearly established" constitutional rights and thus respondent federal agents were entitled to qualified immunity from suit. *Id.* at 20, 24. The court of appeals affirmed the dismissal of petitioners' RICO claims on the ground that petitioners failed to assert a violation of "clearly established" statutory rights, and therefore respondent federal agents were entitled to qualified immunity from suit. *Id.* at 14-15. The court of appeals subsequently denied a petition for rehearing. *Id.* at 37-38.

ARGUMENT

The court of appeals' decision to affirm the dismissal of petitioners' claims was correct and does not conflict with any decision of this Court or any other circuit. Petitioners contend that the court of appeals erroneously decided when their Federal Tort Claims Act and *Bivens* claims accrued; that the court should have applied a longer limitations period to their *Bivens* claims; and that the court should have afforded them discovery before holding that respondents were entitled to qualified immunity from suit. Petitioners' claims are without merit, and do not warrant this Court's review.

1. Petitioners contend that the court of appeals erred in deciding that their claims brought pursuant to the Federal Tort Claims Act, as well as their claims that respondent federal agents violated their Fifth Amendment rights, brought pursuant to *Bivens*, accrued in August and September 1993, when the events which form the basis of petitioners' allegations occurred. Pet. 21; Pet. App. 18-20. Contrary to petitioners' contention, the court of appeals correctly

applied settled principles of law governing the accrual of federal claims, and that decision does not warrant review.

a. Prior to bringing an action in district court pursuant to the Federal Tort Claims Act, a prospective plaintiff must present his claim in writing to the appropriate federal agency. See 28 U.S.C. 2675(a). If a claim is not presented within two years after it accrues, it is barred. See 28 U.S.C. 2401(b). A tort claim "accrues" within the meaning of Section 2401(b) when the plaintiff is aware both of the existence of the injury and its cause, that is, the connection between the injury and the defendant's action. See *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). The same accrual analysis applies to claims brought pursuant to *Bivens*, which, as we explain below, have a two-year statute of limitations. See *Moore* v. *McDonald*, 30 F.3d 616, 620-621 (5th Cir. 1994); *Piotrowski* v. *City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995).

The court of appeals correctly applied these accrual principles to petitioners' claims. Petitioners presented their claims brought pursuant to the Federal Tort Claims Act to the FBI, NASA, and DCIS on January 8 and 10, 1996. Pet. App. 19, 46. They filed suit alleging violations of constitutional rights pursuant to *Bivens* on February 22, 1996. *Id.* at 7. Petitioners do not dispute that their Complaint "unmistakabl[y]" reflects that Brown, Satterwhite, and Hodgson suffered injuries more than two years prior to presenting their FTCA claims in writing, Pet. 23; see also Pet. App. 61-62, and thus, also more than two years before bringing claims under *Bivens*. Applying the FTCA rules on claim presentation and the two-year statute of limitations applicable to *Bivens* claims, the court of appeals cor-

rectly determined that petitioners' claims were time-barred. Pet. App. 18-20.

b. Petitioners contend, however, that their Complaint did not state that they knew "the identity of the specific agents involved in this matter more than two years before they presented their claim in writing." Pet. 23. They therefore take the position that the district court and the court of appeals erred in determining that their claims accrued at that time. *Ibid.*

Contrary to petitioners' argument, a claim accrues when a party has knowledge of the fact of injury and its cause, not when a party is aware of the identity of the specific agents involved. See, *e.g.*, *Gibson* v. *United States*, 781 F.2d 1334, 1344 (9th Cir. 1986), cert. denied, 479 U.S. 1054 (1987). In any event, petitioners may not have known the names of the individuals who allegedly harmed them, but they concede that they were aware of their identities as law enforcement officials more than two years prior to presenting their claim in writing, and more than two years prior to bringing suit under *Bivens*. Pet. 8, 23. The court of appeals therefore correctly dismissed petitioners' claims as time-barred.[4]

2. a. Petitioners also contend that the court of appeals erred in applying a two-year statute of limitations to their *Bivens* claims. Contrary to petitioners' contention, the court of appeals correctly concluded that petitioners' *Bivens* claims are governed by Texas' two-year personal injury statute of limitations. See Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon

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[4] Petitioners state that the general public was not aware of the investigation until February 1994, Pet. 23, but petitioners do not claim that they were unaware of the agents' true identities once the investigation was revealed to them, nor that the agents concealed their identities after that point.

1986 & Supp. 2000). Courts of appeals that have addressed the issue generally agree that for the purposes of determining the applicable statute of limitations, the same rule applies to claims against federal officials brought pursuant to *Bivens* as applies to claims against state officials brought pursuant to Section 1 of the Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, currently codified at 42 U.S.C. 1983 (1994 & Supp. III 1997). Pet. 14. This Court has held that the limitations period for claims brought pursuant to Section 1983 is determined by reference to the statute of limitations applicable to personal injury claims in the relevant State. See *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985), see also *Owens* v. *Okure*, 488 U.S. 235, 249-250 (1989); Pet. 14. Accordingly, the court of appeals correctly determined that Texas' two-year limitations period applicable to personal injury claims applied to petitioners' claims brought pursuant to *Bivens*.

b. Petitioners contend that a different statute of limitations should apply to their *Bivens* claims because the constitutional wrongs they allege sound in the nature of "fraud," rather than personal injury. Pet. 14-15.[5] Petitioners therefore argue that the court of appeals should have applied Texas' four-year fraud statute of limitations to their *Bivens* claims. See Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(4) (Vernon Supp. 2000); Pet. 15.

Petitioners' claim lacks merit. This Court recognized in *Wilson* v. *Garcia* that almost every Section 1983 claim can be analogized to one of the many common law forms of action, or to a claim arising under statute.

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[5] Although petitioners attempt to distinguish their claim from a typical *Bivens* or Section 1983 claim, they recognize that the circumstances of this case are "hardly unique." Pet. 16.

Wilson, 471 U.S. at 272-273. If the statute of limitations applicable to Section 1983 claims turned on the particular facts of each claim, "uncertainty and time-consuming litigation" would inevitably result. *Id.* at 272. Therefore, this Court determined that one statute of limitations should apply to all Section 1983 claims. Because those claims are most appropriately characterized as personal injury claims, the relevant state statute of limitations applicable to personal injury actions should apply. *Id.* at 275, 278, see also *Owens*, 488 U.S. at 249-250. Petitioners do not dispute that claims brought pursuant to *Bivens* should be treated the same as claims brought pursuant to Section 1983 for statute of limitations purposes. The court of appeals' application of Texas' limitations period for personal injury claims to petitioners' claims brought pursuant to *Bivens* is therefore consistent with *Wilson* and *Owens* and does not warrant review by this Court.

3. Petitioners also contend that the court of appeals erred in holding that respondent federal agents were entitled to qualified immunity from suit and in dismissing their *Bivens* claims on that ground, without allowing petitioners discovery on that issue. Pet. App. 16-20. Because on this record the court of appeals' resolution of the immunity issue was fully consistent with this Court's immunity jurisprudence, no further review is warranted.

a. "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). This rule provides officials with immunity from suit, rather than a mere defense to liability. *Mitchell* v. *Forsyth*, 472

U.S. 511, 526 (1985). For that reason, a defendant pleading qualified immunity is entitled to dismissal before discovery commences, unless "the plaintiff's allegations state a claim of violation of clearly established law." *Ibid.*; *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996) (qualified immunity allows government officials to avoid not only trial but pretrial burdens such as discovery). The court of appeals correctly concluded that petitioners' complaint should be dismissed on the basis of respondents' qualified immunity, because the complaint failed to allege a violation of any clearly established constitutional right. Pet. App. 20-24. Discovery has no bearing on the complaint's sufficiency in this respect.

b. Petitioners suggest that *Wilson* v. *Layne*, 526 U.S. 603 (1999), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), require that the court of appeals allow them discovery as to (1) whether the conduct at issue was commonplace, or an isolated incident; (2) whether the FBI maintained policies that authorized or prohibited the conduct at issue; and (3) the specific information that each federal agent possessed, regarding whether they knew their conduct was inappropriate. Pet. 18-19. Contrary to petitioners' suggestion, the court of appeals properly resolved the immunity issue without allowing petitioners discovery.

When plaintiffs' allegations fail to state a claim of clearly established law, defendants pleading qualified immunity are entitled to dismissal before the commencement of discovery. See *Mitchell*, 472 U.S. at 526; see also *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987). *Crawford-El* is not to the contrary. See *Crawford-El*, 523 U.S. at 598 (stating that if the defendant pleads the immunity defense, "the district court should resolve that threshold question before permitt-

ing discovery."). *Wilson*, on which petitioners also rely, simply recognized that whether official action is unique or commonplace, and whether an agency policy authorizes that action, may bear on the question whether the conduct at issue was reasonable, in "light of clearly established law." *Wilson*, 526 U.S. at 615; *Mitchell*, 471 U.S. at 534. The frequency of official action, and the existence of an agency policy are not relevant here, where petitioners agree that this case is the first to address the parameters of due process protection afforded innocent third parties in the context of undercover investigations, and thus that the relevant law was not clearly established at the time the conduct occurred. Pet. 18.[6] Moreover, *Wilson* does not suggest that petitioners are entitled to discovery on those issues. In any event, even if discovery revealed that respondents were acting in violation of agency policy, or that their actions were not commonplace, they would not thereby lose their qualified immunity. See *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) (officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates an administrative provision).[7] The court of appeals ap-

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[6] The third factor proposed by petitioners suggests that the immunity analysis rests in part on each individual agent's subjective belief as to the lawfulness of his or her actions. *Harlow* and its progeny establish that the agents' subjective belief is irrelevant. See *Anderson*, 483 U.S. at 641.

[7] Petitioners also claim that the district court and court of appeals erred in dismissing their RICO claims on grounds of qualified immunity without affording them discovery. Pet. 20. Petitioners do not explain why this is so, or how discovery bears on whether their rights under RICO were "clearly established." In any event, the court of appeals correctly determined that petitioners failed to allege a violation of clearly established

propriately determined that respondents were entitled to qualified immunity because petitioners allege violations of rights that were not "clearly established" at the time the conduct at issue occurred. That decision is correct, and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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statutory rights and therefore that respondents were entitled to qualified immunity, and that determination does not warrant review. Pet. App. 12-14.